(25,617)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 787.

CLEVELAND-CLIFFS IRON COMPANY AND WILLIAM G. MATHER

vs.

THE ARCTIC IRON COMPANY.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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1 Filed Nov. 14, 1916. Wm. C. Cochran, Clerk.

United States Circuit Court of Appeals, Sixth Circuit.

No. 2758.

CLEVELAND-CLIFFS IRON COMPANY and WILLIAM G. MATHER, Appellants,
vs.
THE ARCTIC IRON COMPANY, Appellee.

Appeal from the District Court of the United States for the Western District of Michigan, Northern Division.

Submitted March 15, 1916. Certified November 14, 1916.

Before Warrington and Denison, Circuit Judges, and Sanford, District Judge.

Per Curiam:

For a due understanding of the questions to be certified, we make the following findings of fact:

(1) Prior to 1883, William P. Healy and Edward Breitung, both of Marquette, Michigan, arranged to purchase in equal interests an undivided one-half of a large tract of land in that vicinity supposed to contain iron ore. For the purpose of holding title to this purchase, they formed, under the laws of Michigan, a corporation named the Arctic Iron Company (hereinafter called the Arctic). This was in 1883. Its $500,000 of capital stock was paid up by the transfer to it of this half interest in this land. Nominal amounts of stock were issued to Mrs. Healy and Mrs. Breitung, and the total capital held, one-half by Mr. and Mrs. Breitung and one-half by Mr. and Mrs. Healy. The articles of association provided for four directors. Breitung was president and Healy secretary and treasurer. Thereafter occasional stockholders' and directors' meetings were held, annual reports to the state were made and conveyances and contracts were, from time to time, executed in corporate form. The corporation had charter power to engage in the mining business, either by itself or by lessees, on that tract of property which it had so acquired. Its actual business, from its organization until 1899, consisted in leasing portions of its property under customary mining leases and receiving royalties therefrom, although, in the earlier part of the period, it did some exploration work. With this exception, the corporate
2 expenses were negligible. There were no salaries paid. In practice Breitung (and, later, Breitung's successors) and Healy consulted and agreed upon what leases should be made, and Healy, in the name of the company, collected all royalties and disbursed them, one-half to Breitung and one-half to himself. These

disbursements were entered by Healy on his books as dividends, but were made without any action by the directors. It was the specific intent of Healy and Breitung, in providing for four directors, to effect a perfect balance of power between the two interests.

Breitung also purchased, individually, the other undivided half of parts of the same tract in which the Arctic owned a one-half interest, and also purchased, individually, the entire title to some adjoining properties. About 1886, Breitung died. All his interests in the Arctic and in the real estate which he owned passed to his son, Edward Breitung, Jr., and his widow, Mary Breitung, who afterwards became Mrs. Kaufman. The Breitung interests in these properties were thereafter handled by these parties (hereinafter designated as Kaufman and Breitung) in the same manner as by Breitung, in his lifetime, and the relations between Healy and the Breitung successors continued the same as between Healy and Breitung.

(2) The Cleveland-Cliffs Iron Company (hereinafter called the Cliffs) was a corporation organized under West Virginia laws, having its principal places of business at Cleveland and at Ishpeming, Michigan, near Marquette. It had a paid-in capital of substantially $5,000,000. William G. Mather was president and treasurer. He held $14,100 par value of the stock, and relatives held about $236,000, making a total of about $250,000, or five per cent. of the entire capital. The Cliffs owned stock in various subsidiary corporations.

(3) The Oliver Iron Mining Company (hereinafter called the Oliver) was a corporation with its principal office in Pittsburgh. It was largely engaged in iron mining in the Marquette vicinity. It was a subsidiary of and the Michigan operating branch of the Carnegie Steel Company, and later of the United States Steel Corporation. In 1898 and 1899, the Cliffs and the Oliver were the chief operators in the Marquette region and were the natural and the leading competitors for any mining leases which might be offered. That is to say, the owner of iron ore had the choice between mining, called operating, and offering it for lease to those in the business of operating, reserving a royalty for himself. Such leases were in very
3 common use, and while their details differed, the essentials were three: 1, the amount of royalty per ton; 2, the minimum tonnage guaranteed for each year; and, 3, the cash bonus sometimes paid by the lessee for the privilege of getting the lease upon its fixed terms.

(4) On different dates, from 1886 to 1889, the Arctic, as owner of one-half the fee, and Kaufman and Breitung (and, in two of the leases, others, also), owning the other half, executed four mining leases, each for twenty years, covering parcels of the property in which the Arctic was thus interested. A few years later, the lessee's rights under all these leases became vested in two corporations, the Queen Company and the Blue Company (hereinafter collectively referred to as the Queen), and the stock of these corporations was owned by a partnership, Corrigan, McKinney & Company (hereinafter referred to as Corrigan). The four parcels were thereafter operated under Corrigan together as one enterprise.

(5) Before 1897, the Cliffs had united with another mining oper-

ator in building a railroad intended to carry iron ore from the mining districts to the water at Marquette. Each became a large stockholder. In addition, it was agreed that, after the bonds had been paid from earnings, certain additional stock should be divided between them in proportion to the traffic that each should have brought to the railroad. In that year, a contract was made between the Cliffs, the Queen and Corrigan whereby the Queen was to give to the Cliffs' railroad the carriage of all ore produced by the Queen mines, at a stated price per ton and until an agreed total had been carried, including all ore produced by other properties which the Queen might thereafter control, and also, the carriage of all its traffic of coal and other supplies in the reverse direction, and the Cliffs was to loan $250,000 to the Queen for a stated period upon notes guaranteed by Corrigan. As security for payment of the debt and performance of the traffic contract by the Queen, it transferred to the Cliffs the four mining leases, and Corrigan transferred to the Cliffs all the stock of the Queen with the right to control the Queen by naming directors. The debt was due serially, $50,000 April 2, 1898, 1899, 1900, 1901, 1902. The assignment of the leases to the Cliffs was recorded in Marquette county; and, in February, 1898, Kaufman and Breitung were notified in writing by the Cliffs, that it had become interested in these leases and desired notice in case the lessor made any change or in case the lessees made any default.

(6) The terms of royalty and of minimum in the Queen leases were such that whether the lessees could mine profitably de-
4 pended on the market price of ore at Lake Erie ports. Some of the time prior to 1897, mining under the Queen leases had been profitable; in 1897 and 1898, market prices were low, the Queen could not pay the agreed royalty or meet the minimum without loss, and the lessors had, from time to time, accepted less than the agreed rates rather than forfeit the leases. In the summer of 1898, the iron market was extremely depressed but a revival of business was anticipated for 1899. The Queen and Corrigan were largely indebted, and Corrigan desired to sell all the rights and interests of the Queen. Kaufman and Breitung were notified of this and were informed that in this connection Corrigan, or his vendees, would wish to negotiate a new lease with terms more suitable to the existing market, and Kaufman and Breitung indicated a willingness to take up such negotiation. Corrigan undertook to interest both the Cliffs and the Oliver, as competitive customers for the Queen interests, in connection with such new lease. The Cliffs notified Kaufman and Breitung that it desired to negotiate and take such a lease of the Queen properties, but no progress was made towards the arrangement of terms.

(7) On November 30, 1898, the Cliffs purchased from Mr. and Mrs. Healy their one-half of the Arctic stock. Kaufman and Breitung were at once notified of this purchase. One share of the stock was issued to Mather, one share to Hayden, the Cliffs attorney, and the remainder to Mather, as trustee for the Cliffs. On December 30th, a stockholders' meeting of the Arctic was held, at which Kaufman, Breitung, Mather and Hayden were unanimously chosen the four directors, and Kaufman was made president and Mather

secretary. This choice of directors was in recognition and execution of the plan that two directors should be selected by each stockholding interest. This make-up of officers and directors continued thereafter without change.

(8) During December, the Cliffs definitely offered to take a new lease at an eleven-cent royalty and an annual minimum of 100,000 tons. At about the same time, the Oliver offered to take such a lease at a higher royalty and a larger minimum. Both offers, as well as the subsequent negotiations by each, contemplated a joint lease from the Arctic and Kaufman and Breitung, so covering the entire title, and were made to and with Kaufman and Breitung as representing themselves and the Arctic. Each offering company, the Cliffs and the Oliver, was of the highest standing, both financially and for integrity and fairness and for skill in mining, and save for the terms
5 which might be offered, there was no reason for preferring one to the other as lessee; but, by reason of personal feeling held by Kaufman and Breitung, or one of them, against Mather, they had a fixed determination not to lease to the Cliffs nor permit the Arctic to do so, but rather to lease to the Oliver, if, and as soon as, they could get from it satisfactory terms. In January, Kaufman and Breitung, for themselves and the Arctic, promised the lease to the Oliver at a fifteen-cent royalty, on condition that the minimum and other terms could be thereafter agreed upon. Learning of this, the Cliffs offered to take the lease at the same terms in all respects which the Oliver had offered or might offer, and, in addition to pay a substantial bonus. Kaufman and Breitung refused, alleging that they were fairly bound to carry out the arrangement with the Oliver. Shortly thereafter, Kaufman and Breitung were notified that the Cliffs would not consent to this Oliver lease. They threatened legal proceedings to compel the Cliffs to consent, but never took any steps in that direction. They knew that the Oliver lease could not be made without the Cliffs' consent, and for two reasons: (1) the Cliffs was an equal stockholder in the Arctic, and two of the four directors had been selected as representatives of the Cliffs; (2) the deal for a new lease involved the payment by the Oliver of (about) $100,000 to Corrigan for the interests of the Queen under the existing leases controlled by the Cliffs, and the elimination of these leases; it required the consent of the Cliffs to the cancellation of the traffic contract between the Queen and the Cliffs, or the acceptance by the Cliffs of another party in substitution for the Queen in this contract; and it required the consent of the Cliffs to accept payment of the debt due it from the Queen but which was not due for an average of two years. The old leases could not be surrendered by the Queen, without the Cliffs' consent, and they could not be cancelled by the lessors, if the Cliffs, as assignee of the lessees, was willing to make good whatever default by the lessees might exist.

The Cliffs thus had it in its power to, and did, absolutely block the proposed lease to the Oliver: Kaufman and Breitung had it in their power to, and did, block any lease to the Cliffs; and this deadlock continued for some time and until broken as hereafter stated.

Although, as the iron ore market later developed, it turned out

that under the existing leases and during their term the Arctic would have received much more royalty returns than it later did receive during the same period under the new lease, yet, at the time, good business judgment dictated the acceptance by the Arctic of the proposed new lease on the terms offered by the Oliver (and, 6 of course, on the better terms offered by the Cliffs); and the action of each Arctic faction in refusing to consent was inspired by motives of independent interest or feeling aside from interest in the Arctic.

(9) At the instigation of Corrigan, the Cliffs and the Oliver took up negotiations between themselves to see if the Cliffs could not be induced to withdraw its objection to the Oliver lease and to its substitution for existing leases. It resulted that the Cliffs offered the Oliver to withdraw objection if it should be permitted to buy from the Oliver, each year, at cost of mining, one-fourth of the ore taken out by the Oliver under the lease. The Oliver consented, and this arrangement was made, subject to the final negotiation of all the terms of the lease between the Oliver, on the one side, and Kaufman and Breitung on the other. The Cliffs, at the time, alleged as its reason for taking this fraction of the ore, that, in substantial effect, Kaufman and Breitung owned three-fourths and the Cliffs one-fourth of the ore in the ground, and that, in substantial effect, this arrangement permitted Kaufman and Breitung to lease their three-fourths on any terms they could agree upon, and permitted the Cliffs to keep its one-fourth for itself.

(10) This understanding between the Cliffs and the Oliver being had, Kaufman and Breitung were directly or indirectly informed and fully understood that an agreement had been reached between the Oliver and the Cliffs, because of which the Cliffs would no longer object to the Oliver lease; that Kaufman and Breitung were at liberty to go ahead on behalf of themselves and the Arctic and negotiate the best terms they could get from the Oliver; and that when terms had been agreed upon satisfactory to Kaufman and Breitung and the Oliver, the Cliffs, as the controller of the existing leases which blocked the way, would consent to their cancellation; and the Cliffs, as a stockholder in the Arctic, would sanction, and Mather and Hayden, as directors in the Arctic, would approve, and Mather, as an officer of the Arctic, would execute, a lease embodying such terms. Kaufman and Breitung made no inquiry concerning the terms of the agreement which they thus learned had been made between the Cliffs and the Oliver.

(11) The Cliffs knew that if Kaufman and Breitung learned that it was thus getting one-fourth of the ore, they would refuse to go on. The Cliffs and Mather, therefore, then and thereafter, did not disclose to them this fact, and requested the Oliver not to disclose the same, and the Oliver complied. Both the Cliffs and the Oliver took pains to put the deal in such shape that papers likely to 7 be seen by Kaufman and Breitung should not reveal this fact. By these means, it came about that Kaufman and Breitung did not learn that the Cliffs was to be interested in the ore.

(12) Thereupon, on the one hand, Kaufman and Breitung, for

themselves and the Arctic, and, on the other hand, the Oliver, proceeded to agree upon the details and all the terms of the lease. Kaufman and Breitung insisted upon many concessions, and, in the end, procured the best terms in all respects for the Arctic that could have been procured from the Oliver or from any one—i. e., fifteen cents and 250,000 tons minimum—(except as the fact that the Cliffs was willing to offer better terms, and other facts herein specifically found, may affect this conclusion). In the negotiations with the Oliver, neither the Cliffs nor Mather took any part, excepting as to certain details affecting other interests which the Cliffs had in the subject-matter, and which other interests we have not stated, since their connection with the questions now involved is remote. The contract so agreed upon having been reduced to form, and being approved as to form in all details by counsel for Kaufman and Breitung, for the Cliffs and for the Oliver, it was approved by a stockholders' meeting of the Arctic, the Cliffs' stock being voted in the affirmative, and was approved by a directors' meeting of the Arctic by the unanimous vote of the three directors present, Kaufman, Breitung and Hayden (Mather being not present); and having been signed by Kaufman and Breitung in their individual rights, and the signature of the Arctic having been attached by Kaufman, as president, Mather as secretary of the Arctic, attested the signing.

(13) The general understanding existing between the Cliffs and the Oliver prior to the executing of the Arctic-Oliver lease, was later carried out by the following definite agreement, and its provisions are to be taken as contemplated at the earlier period:—That they would organize a corporation, the Regent Mining Company, with a cash capital of $450,000, of which the Oliver would pay in three-fourths and the Cliffs one-fourth; that the new lease would be assigned to the Regent which would assume and carry out the traffic contract and pay to the Cliffs its $250,000 debt, and pay to Corrigan and the Queen 100,000 tons of ore (then worth about $100,000) for their interest in the old leases; that in lieu of dividends, the Oliver would buy of the Regent, at the cost of mining, three-fourths, and the Cliffs would buy one-fourth of the ore mined each year; and that the Cliffs would pay the Oliver, in cash, one-fourth of the $131,500 which the Oliver had paid Kaufman and Breitung for one-fourth of the fee in some of the parcels
8 leased, as hereinafter stated. It was further provided that, by notice given in any year before the season of navigation opened, the Cliffs could limit the amount of ore which it would take under the contract during the then current year (it being contemplated that all ore shipments would be by water between April and December).

This arrangement between the Oliver, the Cliffs and the Regent, went into effect in the spring of 1899. In 1904, Kaufman and Breitung first acquired knowledge of the fact that the Cliffs had this interest in the lease. Thereupon, and without any action by the stockholders or directors of the Arctic or any request therefor, Kaufman and Breitung caused the bill of complaint in this cause to be filed in the name of the Arctic, as complainant, and executed by

Kaufman, president, and Breitung, director. By this bill, they sought a decree that all the interests in the lease held by the Cliffs or Mather, including the one-sixteenth interest in fee bought from the Oliver and including the Cliffs' stockholding interest in the Regent were held in trust for the Arctic, and were, in equity, the property of the Arctic, and should be conveyed to the Arctic upon payment to them by the Arctic of what, upon an accounting, might be found to be the actual, legitimate cost thereof to the defendants; that the defendants account to the Arctic for all profits from the ores received by them under the lease and under the Regent stockholding—the Arctic offering to pay to defendants any sums which might be found equitable on account of the prayed substitution of the Arctic for defendants in these property interests; and that the defendants be enjoined from otherwise disposing of this property, and that plaintiff have general relief. The district court, on final hearing, decreed the existence of the trust as prayed, and directed an accounting; upon such accounting, which covered the period till 1913, the master found that the Cliffs, in the course of carrying on one branch of its general business, had made, from the resale of the ore which had come from the one-fourth of the lease, profits amounting to $900,000. The district court thereupon rendered judgment against the Cliffs and Mather for the amount of profits so found. The $112,500 paid by the Cliffs for its share of the Regent capital was credited to the Cliffs, in stating the account of profits.

(14) In one of the leased parcels only an undivided one-fourth of the fee had belonged to Kaufman and Breitung, until they had purchased another one-fourth thereof from Rees. In closing the terms of the lease with the Oliver, they insisted, as a condition of making the lease, that the Oliver should buy this Rees one-
9 fourth interest in the fee of this parcel for $131,500 cash. The Oliver acquiesced and paid that sum. Kaufman and Breitung did not disclose to the Cliffs that they were making this sale in connection with the lease; but the Cliffs learned this fact from the Oliver, and, as a condition of getting one-fourth of the ore taken under the lease, the Cliffs acquiesced in the Oliver's request that the Cliffs should buy from it one-fourth of this interest or one-sixteenth of the fee for the price of $32,875, and the Cliffs paid that sum in cash to the Oliver. The price so received by Kaufman and Breitung, $131,500, was twice the then fair value of the one-fourth interest purchased, and the Oliver purchased the same, not because it otherwise desired such interest but because it was necessary to make the purchase at this price in order to get the lease from Kaufman and Breitung. In the accounting, this $32,875 was credited to the Cliffs.

(15) Wherever the action of the Cliffs is herein referred to, it acted immediately by Mather, its president and treasurer. He consulted, from time to time, with members of the executive committee of the Cliffs' board of directors, but no formal action at stockholders' or directors' meetings was taken in regard to any of the subject-matter. In fact, Mather acted wholly on behalf of the Cliffs and in no respect in his personal interest (except as such interest existed through his stock holding in the Cliffs). It was fully understood by Kaufman

and Breitung that Mather was thus speaking and acting for the Cliffs. Mather neither expected nor received any personal benefit whatever from any of the transactions herein recited.

(16) Kaufman and Breitung were very large owners of iron ore lands in Michigan and other states. They were men of great business experience and ability in all matters pertaining to iron ore. In these respects, they were on an equality with Mather, and in concluding, as directors of the Arctic, to make the Oliver lease, they did not in fact rely in any degree upon Mather's judgment, but relied upon themselves and their own ability to make a good bargain. Mather exercised no influence or efforts to bring about the making of the lease to the Oliver, nor did he in any way mislead or deceive or defraud Kaufman and Breitung in the subject-matter—unless such misleading or fraud are to be inferred as matter of law from his directorship in the Arctic and his keeping from his fellow directors knowledge that the Cliffs was acquiring an interest.

(17) By the secret coming in of the Cliffs as partial lessee, the Arctic suffered no prejudice, but rather benefit, since the Cliffs' interest had a tendency to increase the minimum to which the Oliver would agree in advance, and to increase the amount mined and paid for every year. It would have been impossible for Mather to have procured for the Arctic this concession of one-fourth the ore at cost, which was procured for the Cliffs. This for three reasons: (1), the Oliver would not have consented, as it could not have received from the Arctic the considerations it was getting from the Cliffs; (2), Kaufman and Breitung, for the Arctic, would not have consented, since their fixed policy was to lease on royalty and not to undergo any of the risks of mining or of dealing in ore; and, by the advance notice provision, the Cliffs could only minimize, not escape, mining and market risks. With this fixed policy, it is certain that Kaufman and Breitung would not have allowed the Arctic to invest $145,375 cash with the Oliver in the Regent; (3), the Cliffs would not have consented, since it would not allow the Arctic to get the benefit of concessions resulting from the Cliffs' control of the situation.

(18) Upon the whole transaction, on the one hand, the Cliffs received: (*a*), the chance of profit on the one-fourth of the ore; (*b*), full payment of its debt from the Queen. On the other hand, it paid, invested in or submitted to: (*a*), the chance of loss on the ore; (*b*), $32,875 in a fractional fee interest it did not want; (*c*), $25,000 (about) to Corrigan for the Queen interest in the old leases; (*d*), $87,500 ($112,500—$25,000) toward the working capital of the Regent, a corporation in the control of others; (*e*), the substitution, as its traffic debtor, of a corporation in the control of a competitor for a corporation controlled by itself.

Upon these facts we desire the instruction of the supreme court for our proper decision of the following questions of law arising thereon (which for clarity we state in alternative form):

1*a*. Is the Cliffs, stockholder in the Arctic and also Mather's independent principal, so far affected by any fiduciary duties which may have rested on its agent, Mather, as a director in the Arctic, that the

Arctic may recover from the Cliffs the latter's profits under the lease, although no trust rested directly upon it, and although the director, Mather, received no personal benefit? or,

1*b*. Is plaintiff's remedy, if it has any as against the Cliffs, confined to rescission?

2*a*. Does the conduct of Kaufman and Breitung, in insisting upon benefit to their outside interests as a condition of their consent to the lease, bar them, in their own names or in the name of the
11 Arctic, from complaining in a court of equity of the conduct of the Cliffs, in insisting upon benefit to its outside interests as a condition of its consent to the lease? or

2*b*. Did their conduct pertain to a matter so distinct from that conduct of the Cliffs, of which they complain, that the rule of clean hands does not apply?

3*a*. When Kaufman and Breitung were informed that the Cliffs had reached with the Oliver such an agreement that the Cliffs was willing to withdraw further objection to the Oliver lease, were they then and there bound to inquire as to the terms of such agreement, and when they did not, but proceeded without inquiring, did they thereby so far acquiesce in whatsoever terms were included in the agreement that a court of equity will not entertain their later complaint? or,

3*b*. Were they justified in assuming that the agreement did not pertain to the lease itself, but to some outside matters of conflicting interests between the Cliffs and the Oliver?

4*a*. Under the existing make-up of the Arctic, did Mather, as one of the Cliffs' directors of the Arctic, owe any duty to the Arctic or to the Breitung directors thereof to disclose that he had an outside interest in a contract which was about to be made by the Arctic and which was in fact well advised and for the best interest of the Arctic? or,

4*b*. Was his directorship duty, under the existing relations of the two bodies of stockholders to each other and to the Arctic, and after he had offered to procure for it an even better contract, satisfied so long as he did nothing to promote the proposed contract and left the decision whether it should be made and the terms thereof wholly to the Breitung directors?

5*a*. When it appeared that the Cliffs had interests and desires pertaining to the new lease which might conflict with the course Kaufman and Breitung desired the Arctic to take, did the Cliffs and Mather perform every duty which by law rested upon him as director of the Arctic and through him upon the Cliffs when Mather withdrew from any further participation in the matter and notified Kaufman and Breitung that they could go ahead and make for the Arctic a contract satisfactory to them, and that the Cliffs and Mather would acquiesce therein? or,

5*b*. Was it the duty of Mather, as director in the Arctic, either to disclose to Kaufman and Breitung what he had done and the
12 knowledge he had acquired as an officer of the Cliffs and on behalf of the Cliffs, or else to resign as a director in the Arctic?

6*a*. If it was the legal duty of Mather to disclose to the Breitung directors the fact that the Cliffs was to be interested in the lease, is the further fact, that, as the net result of the transaction, Kaufman and Breitung leased their beneficial three-fourths in the ore upon their own terms and the Cliffs retained its one-fourth interest in the ore, sufficient to bar a court of equity from enforcing any trust which might otherwise arise in favor of the Arctic in and to such one-fourth interest? or,

6*b*. Did such trust, as matter of law, become so fixed that a court of equity will proceed according to the legal rights of the Arctic without regard in this particular, to the relative beneficial interests of the stockholders?

Since we are of the opinion that there was no fraud or misleading or breach of director-ship duty by Mather, unless the same arose, wholly as matter of law and as a presumption of law, from the relations of the parties herein set out, the question so presented has seemed to us proper for certifying to the supreme court. This question is thought to be stated in its most inclusive form by No. 5. What we regard as a narrower phase of the same matter is formulated by No. 4. Nos. 1, 2, 3 and 6 present other problems, each of which will be controlling of the case, if answered adversely to plaintiff, and those questions are included in this certificate because we desire the instruction of the supreme court thereon, and because we assume that the supreme court may prefer to conclude that it is unnecessary to answer 4 and 5 because of some matter involved in another question. However, we consider that No. 5 presents question of law which is, in the view most favorable to plaintiff, the ultimate one; and we desire that this question be answered, without prejudice from the inclusion of others in this certificate, if it shall be thought that the inclusion of the others is not in accordance with the practice of the supreme court in this respect. We have considered—and reached a conclusion concerning—several issues of law not covered by any questions certified, and several issues of fact not mentioned herein.

J. W. WARRINGTON,
A. C. DENISON,
E. T. SANFORD,
Judges of the Circuit Court of Appeals for the Sixth Circuit, Sitting in This Cause.

13 United States Circuit Court of Appeals for the Sixth Circuit.

UNITED STATES OF AMERICA,
Sixth Judicial Circuit, ss:

I, William C. Cochran, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing certificate and statement of facts in the case of Cleveland-Cliffs Iron Company and William G. Mather, Appellants vs. Arctic Iron Company, Appellee, was duly filed and entered of record in my office by order of said Court, and as directed by said Court, the said certificate

is by me forwarded to the Supreme Court of the United States for its action thereon.

In Testimony Whereof, I have hereunto subscribed my name, and affixed the seal of said Court, at the City of Cincinnati, Ohio, this 18th day of November, A. D. 1916.

[Seal United States Circuit Court of Appeals, Sixth Circuit.]

WILLIAM C. COCHRAN,
Clerk of United States Circuit Court of Appeals for the Sixth Circuit.

Endorsed on cover: File No. 25,617. U. S. Circuit Court Appeals, 6th Circuit. Term No. 787. Cleveland-Cliffs Iron Company and William G. Mather vs. The Arctic Iron Company. (Certificate.) Filed November 24th, 1916. File No. 25,617.

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Office Supreme Court, U. S.
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JAMES D. MAHER
Clerk

IN THE

Supreme Court of the United States

NUMBER [redacted]75

(October Term, 1916).

CLEVELAND-CLIFFS IRON COMPANY AND WILLIAM G. MATHER, APPELLANTS,

v.

ARCTIC IRON COMPANY, APPELLEE.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Motion and Petition for Writ of Certiorari on behalf of The Arctic Iron Company together with Brief in support and Notice of Motion.

S. W. Shaull,
A. C. Angell,
Counsel for the Arctic Iron Company, Appellee and Petitioner.

IN THE

Supreme Court of the United States

NUMBER 787.

(October Term, 1916).

CLEVELAND-CLIFFS IRON COMPANY AND WILLIAM G. MATHER, APPELLANTS,

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ARCTIC IRON COMPANY, APPELLEE.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

MOTION.

Now comes the Arctic Iron Company, Appellee in the above entitled cause, by S. W. Shaull and A. C. Angell, its counsel, and moves this Honorable Court to enter an order requiring that the Honorable, the Circuit Court of Appeals for the Sixth Circuit certify the whole record in the above entitled cause to this Court for its review and determination, and that a writ of certiorari or other process issue, directed to said Circuit Court of Appeals, in order that the whole of said record may be so certified, and to that end it

now tenders, herewith, its petition, and brief in support thereof, with a certified copy of the entire record in said cause in said Circuit Court of Appeals.

S. W. Stanley.....

A. L. Angell.....

Counsel for Arctic Iron Company, Appellee.

IN THE

SUPREME COURT OF THE UNITED STATES

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CLEVELAND-CLIFFS IRON COMPANY AND WILLIAM G. MATHER, APPELLANTS,
v.
ARCTIC IRON COMPANY, APPELLEE.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

NOTICE.

The Cleveland-Cliffs Iron Company and William G. Mather, Appellants in the above entitled cause, are hereby notified tha the Arctic Iron Company, Appellee therein, will, on the ..5th.... day of February 1917, upon its verified petition and a copy of the entire record in said cause, at the opening of Court on that day, or as soon thereafter as coun-

sel can be heard, submit a motion (a copy of which and of the petition for a writ of certiorari and brief in support thereof is herewith served on you) to the Supreme Court of the United States in its Court Room in Washington, D. C.

P. W. Stanly.....

A. L. Angell.....

Counsel for the Arctic Iron Company, Appellee.

Service this day is hereby acknowledged of the foregoing notice of motion and copy of motion and petition for a writ of certiorari, and brief in support thereof.

Dated: January 16., 1917.

Horace Andrews.....

W. P. Belden.....

A. L. Dustin.....

Counsel for Cleveland-Cliffs Iron Company and William G. Mather, Appellants.

IN THE

SUPREME COURT OF THE UNITED STATES

NUMBER 787.

(October Term, 1916).

CLEVELAND-CLIFFS IRON COMPANY AND WILLIAM G. MATHER, APPELLANTS,

v.

ARCTIC IRON COMPANY, APPELLEE.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Petition for Writ of Certiorari Requiring the Said Circuit Court of Appeals to Certify to This Court, For Its Consideration, Review and Determination, the Whole Record in Said Cause.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of the Arctic Iron Company respectfully shows to the Court as follows:

1. The Arctic Iron Company filed its bill of complaint in the Circuit Court for the County of Marquette and state of Michigan against the Cleveland-Cliffs Iron Company and William G. Mather.

On the petition of the defendant, the said cause was removed to the District Court of the United States for the Western District of Michigan. It was heard upon the merits of the said cause by the Honorable Loyal E. Knappen, then District Judge, and a decree was entered therein in favor of the complainants. A reference was thereupon, in accordance with said decree, had to a Master in Chancery to take an accounting. Upon the filing of the master's report, a motion was made by the defendants in said cause for leave to open the decree. This motion was argued before the Honorable Clarence W. Sessions, then Judge of the District Court for the Western District of Michigan, and was by him denied upon its merits. Thereupon an appeal was taken by said defendants to the Circuit Court of Appeals for the Sixth Circuit and was argued by counsel and submitted on March 15th, 1916.

On November 14th, 1916, the three Judges, sitting in said Court, differing in conclusions of fact from the two judges who had sat in the District Court, signed a certificate in which were made certain findings of fact and certain requests for the instruction of this Court relative to certain questions of law, all of which more distinctly appears by the certificate signed by said Judges and duly filed in this Court.

2. A certified copy of the entire record in said Circuit Court of Appeals is herewith furnished as part of this application, in conformity with Rule 37 of this Court relative to cases brought from the Circuit Court of Appeals, and said record is marked "Exhibit A."

3. Your petitioner believes that certain findings of fact set forth in said certificate are not warranted by the testimony contained in said record; that by them justice is denied petitioner; and that the importance of the answers to the questions propounded in said certificate largely depends

upon the conclusions of fact to be drawn properly from the entire record.

4. That some of the findings of fact which petitioner claims not to be warranted by the testimony in said record are as follows:

(1) That the fact found on page 2, paragraph (1), of the certificate:

> "These disbursements were entered by Healy on his books as dividends, but were made without any action by the directors,"

is, as stated, not warranted by the testimony, in that it appears by the record, herewith submitted, that action on the part of the directors had been taken in the matter.

(2) That the fact found on page 4, paragraph (8), of the certificate:

> "There was no reason for preferring one (company, the Oliver) to the other (company, the Cliffs) as lessee, but by reason of the personal feeling held by Kaufman and Breitung, or one of them, against Mather, they had a fixed determination not to lease to the Cliffs nor permit the Arctic to do so,"

is, as stated, not warranted by the testimony appearing in said record, in that it appears by said record that the control by the Cliffs Company of one-half of the stock of the Arctic Company might prevent the Arctic Company from enforcing the terms of a lease from it to the Cliffs Company.

(3) That the fact found on page 4, paragraph (8), of the certificate, that they (Kaufman and Breitung) knew

> "(2) the deal for a new lease involved the payment by the Oliver of (about) $100,000 to Corrigan for the interests of the Queen under the existing leases controlled by the Cliffs,"

is, as stated, not warranted by the testimony, in that

it appears by the record, herewith submitted, that the arrangement with Corrigan, and the other arrangements between the Cliffs and the Oliver, were purposely concealed from the Arctic Iron Company.

(4) That the fact found on page 6, paragraph (12), of the certificate:

> "In the negotiations with the Oliver neither the Cliffs nor Mather took any part excepting as to certain details affecting other interests which the Cliffs had in the subject matter,"

is, as stated, not warranted by the testimony, in that it appears from the record, that the counsel of the Cliffs Company, and a director of that Company, took a leading part in the drafting of the lease which was ultimately signed with the Oliver Company.

(5) That the fact found on page 6, paragraph (13), of (13), of the certificate:

> "It was further provided that by notice given in any year before the season of navigation opened, the Cliffs could limit the amount of ore which it would take under the contract during the then coming year,"

is, as stated, not warranted by the testimony in said record, in that it was provided that the Cliffs could decline to take any ore in any year.

(5a) That the fact found on page 7, paragraph (14), of the certificate:

> "The price so received by Kaufman and Breitung, $131,500 was twice the fair value of the one-fourth interest purchased, and the Oliver purchased the same, not because it otherwise desired such interest but because it was necessary to make the purchase at this price in order to get the lease from Kaufman and Breitung,"

is, as stated, not warranted by the testimony, in that it appears from the record without dispute that the Oliver at about this time started to acquire non-bessemer properties from which to make steel by the open

hearth process (R., Ex. A, pp. 587-8, 590), and Mr. Gayley testified that he was indifferent whether they purchased it or not, while both Gayley and Clemson (who were the sole representatives of the Oliver in making such purchase), testified that it was not a bad bargain for the Oliver (R., Ex. A, pp. 104, 118), in which they were corroborated by the engineer who examined for the Oliver (R., Ex. A, 589, 590, 591, bottom).

(6) That the fact found on page 8, paragraph (16), of the certificate, that Mather

> "did not in any way mislead or deceive or defraud Kaufman and Breitung in the subject matter,"

is, as stated, not warranted by the testimony in said record, in that the terms of the temporary arrangement between the Cliffs and the Oliver Company, whereby the Cliffs was to get, pending completion of the lease, at cost, one-quarter of the ore mined by the Oliver, were concealed from Breitung and Kaufman with care, and were set forth in a secret written memorandum (R., Ex. A, p. 372) and in part in two letters instead of in one document (R., Ex. A, pp. 361, 362), in order that the complainants might not be apprised of the real arrangement; the permanent arrangement was fully set forth in an agreement between them, the existence of which was likewise carefully concealed from Breitung and Kaufman.

(7) That the fact found on page 8, paragraph (17), of the certificate:

> "It would have been impossible for Mather to have procured for the Arctic this concession of one-quarter of the ore at cost, which was procured for the Cliffs,"

is, as stated, not warranted by the testimony in said record, in that Mather testified that it would have been possible to have procured this concession for the Arctic.

(8) That the fact found on page 8, paragraph (18), of the certificate:

> "(e) The substitution as its traffic debtor of a corporation in the control of a competitor for a corporation controlled by itself,"

is, as stated, not warranted by the testimony in said record, in that said competitor was able to give, and did give, to the railroad of the Cliffs a very large traffic, whereas a corporation controlled by itself was unable to operate the mines and give the railroad any traffic.

(9) That the conclusion of fact found on page 10, near the end of the certificate:

> "We are of the opinion that there was no fraud or misleading or breach of directorship duty by Mather, unless the same arose wholly as a matter of law and as a presumption of law,"

is one which ought not to have been reached upon the facts contained in said record.

5. That in various other particulars said findings of fact are, as stated, not warranted by said record.

Wherefore, your petitioner respectfully prays:

That an order may be entered, requiring that the whole record and cause be sent up to this court for its consideration, and that the whole matter in controversy may be reviewed and decided in the same manner as if it had been brought to this court by appeal, and that a writ of certiorari may be issued out of and under the seal of this court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding the said court to certify and send to this court a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the said cause therein entitled, "Cleveland-Cliffs Iron Company and William G. Mather, Appellants, against Arctic Iron Company, Appellee, Equity No. 174," to the end that the said cause may be reviewed and determined by this

Court as provided in Section 6 of the Act of Congress, entitled "An Act to Establish Circuit Courts of Appeal, and to define and regulate in certain cases the jurisdiction of the courts of the United States and for other purposes," now carried forward into Section 239 of the Judicial Code; or that your petitioner may have such other and further relief or remedy in the premises as to this Court may seem meet and in conformity with said Act; and that said cause may be heard in this Court as if brought here by appeal.

And your petitioner will ever pray, etc.

Arctic Iron Company

By Mary. Kaufman

State of Ills.....

County of ..Cook.... ss.

On this .17 day of January 1917, before me, the subscriber, a Notary Public in and for said County, personally appeared .Mary Kaufman. who made oath that she had read the foregoing petition, by her subscribed, and knew the contents thereof; that she was the duly authorized.. by. ..... of the Arctic Iron Company, and signed the said petition by its authority and in its behalf; that the said petition was true, except as to matters therein stated to be upon information and belief, and as to such matters she believed it to be true.

.Frank. Rafsett.a...,

Notary Public, .Cook..... County, Ill.

My commission expires .Nov. 12.1918....

Seal

IN THE

SUPREME COURT OF THE UNITED STATES

No. 787.

(October Term, 1916).

CLEVELAND-CLIFFS IRON COMPANY AND WILLIAM G. MATHER, APPELLANTS,
v.
ARCTIC IRON COMPANY, APPELLEE.

BRIEF IN SUPPORT OF THE FOREGOING PETITION.

The petition is made under Section 239 of the judicial code. The Circuit Court of Appeals for the Sixth Circuit, desiring the instructions of this Court on several propositions of law, made a certificate which was filed in this Court last November, and made certain findings of fact in order that questions certified might be understood.

This cause was begun in a State Court of Michigan in 1904; was removed to the United States District Court for the western District of Michigan; was heard there by Judge Loyal E. Knappen, then District Judge, and was decided by him in favor of the complainants. Judge Knappen filed an opinion, stating his views on the facts, which is found in the record attached to the petition as "Exhibit A" at page

481. He directed that an accounting of profits be taken before a master. The accounting proceeded, and the master made a report (Exhibit A, p. 601). A motion to re-open the decree was thereupon made by the defendants in the original suit, which was heard before the Honorable Clarence W. Sessions, then district judge. Judge Sessions carefully examined the record, and concluded that Judge Knappen's decree should stand (R., p. 672).

The defendants in the district court thereupon appealed to the Circuit Court of Appeals, before which the cause was argued in March of 1916.

On the 14th day of November, 1916, the Court made the certificate now on file in this Court.

The facts involved in the controvery are complicated. The pleadings are long. The testimony, as condensed for the appeal, with the necessary exhibits, takes up nearly 400 pages of the printed record "Exhibit A."

A succinct statement of the controlling facts is found in the opening part of the opinion of Judge Knappen (Rec., pp. 481, 485). A more elaborate statement is contained in the findings of fact certified to this Court, some of which, unfortunately of large importance, we are compelled to regard as erroneous. By reason of these last named findings, we have filed the petitions for an order to bring up the record, in order that this Court may review the whole case.

That the importance of the findings of fact to which we object may be understood, it seems necessary to state, as briefly as may be, an outline of the controversy.

This bill was filed by the Arctic Iron Company, to compel the defendant, Cleveland-Cliffs Iron Company, to account to the plaintiff for profits derived by that defendant from a secret bargain made with the Oliver Iron Mining Company about February 14th, 1899, by the defendant Mather, then a director and secretary and treasurer of the Arctic Iron Company, and at the same time President of the Cleveland-Cliffs Iron Company.

The property involved in the case spoken of as the Queen Group of Mines was then under leases owned by Corrigan, McKinney & Company, a Cleveland firm which leases had been pledged to the Cleveland-Cliffs Iron company as security for a loan. These leases, by reason of the royalties reserved, and the then state of the iron market, were a burden on the lessees, who had been trying to get rid of them.

These lessees had sought, among others, to get the Oliver Iron Mining Company to take over the leases or to take a new lease if the existing leases could be annulled.

Defendent William G. Mather for some months had been negotiating for a lease to the Cleveland-Cliffs Iron Company in place of the existing leases.

The fee of the mining property was owned substantially as follows: one-half by E. N. Breitung and his mother, Mrs. Kaufman; one-half by the Arctic Iron Company. The stock of the Arctic Iron Company was owned and controlled: one-half by the Cleveland-Cliffs Iron company; one-half by Mr. Breitung and Mr. and Mrs. Kaufman.

The Oliver Iron Mining Company could not at first get the consent of Mr. Mather that the Arctic Company should give it a lease, because he wanted a lease for the Cliffs Company. Mr. Breitung and the Kaufmans were unwilling to have the Arctic give a lease to the Cleveland-Cliffs. There was some personal feeling between the parties, and it was not deemed advisable that the Cliffs Company, which owned half the stock of the Arctic, and whose representatives comprised half its Board of Directors, should also be the lessee of the Arctic (See R., Exa. A., p. 488).

Finally Mr. Mather agreed with the representatives of the Oliver Company that he, as a stockholder, director and officer of the Arctic Company, would not oppose, but would favor a lease by the Arctic Company to the Oliver Company, upon condition that the latter would agree that the Cleveland-Cliffs Company should receive, in case a lease was made, one-quarter of the ore to be mined, at cost and without any substantial market risk. This arrangement was pur-

posely kept secret from Mr. Breitung and from Mr. and Mrs. Kaufman. In their ignorance of it, a lease was voted and executed by the Arctic Company. The Cleveland-Cliffs later received the ore bargained for.

The persons interested in the Cliffs and in the Oliver organized a West Virginia corporation known as the Regent Iron Company, which became the lessee of the Arctic Company. The Oliver Company, in effect, took three-quarters of the stock of the Regent, and the Cliffs Company one-quarter. The expenses incident to the organization of this Company and the cancellation of the old leases was borne by the two constituent companies in the proportion of three-quarters and one-quarter. Instead of declaring dividends in money as the result of its operations, the shareholders of the Regent Company took ore.

The existence of this bargain was accidentally discovered by Breitung and the Kaufman's in 1914. This bill was filed then by the Arctic Company for an accounting of the profits resulting to the Cleveland-Cliffs from a bargain thus secretly made for its benefit by a director and officer of the Arctic Company.

The decree of the trial Court was for an accounting of those profits. This decree, after a study of the merits of the case, was upheld on final hearing by the then District Judge. Down to April, 1913, these profits were, substantially, $900,000.

1. In the finding of fact, above alleged to be erroneous, in paragraph 4, subdivision (2) of the petition, it is said that "there was no reason for preferring the Oliver to the Cleveland-Cliffs as lessee, but by reason of the personal feeling held by Kaufman and Breitung or one of them, against Mr. Mather, they had a fixed determination not to lease to the Cliffs nor permit the Arctic to do so."

It is true that there is evidence in the record of some personal feeling between one of the Kaufmans and Mr. Mather, but the finding of fact fails to take any account of the other reason, above alluded to, which existed, viz., that if the

Cleveland-Cliffs had become the lessee, the Arctic Company in which one-half of the stock was owned in the interest of the Cleveland-Cliffs, and in which the board of directors was composed to the extent of one-half of representatives of that company, would be in no position to enforce—in case of a breach of the lease or a controversy as to its terms—the contract of lease against the lessee.

2. The finding of fact set out in paragraph 4, subdivision (3), that Messrs. Kaufman and Breitung knew that "the deal for a new lease involved the payment by the Oliver of about $100,000 to Corrigan, McKinney & Company for the interests of the 'Queen' under the existing leases controlled by the Cliffs," is erroneous, and, we submit, quite in contradiction of the testimony.

The whole arrangement made in behalf of the Cliffs by Mr. Mather with the representatives of the Oliver Company was carefully and purposely concealed from the other owners of the Arctic stock. The testimony on the part of the plaintiff is clear as to this,and there is no testimony on the part of the defendants to the contrary (See Test. in Rec., pp. 94, 95, 115, 362, 363, 329, 330).

3. The finding set out in paragraph 4, subdivision (4), that "in the negotiations with the Oliver, neither the Cliffs nor Mr. Mather took any part, excepting as to certain details affecting other interests which the Cliffs had in the subject matter," is, we submit, erroneous. The testimony is undisputed that there were several prolonged interviews between the representatives of the Cliffs and the Oliver, at which nothing was accomplished. Later, and some time in January or February, 1899, the secret arrangement above spoken of was made, whereby the Cliffs' interest withdrew its opposition to the making by the Arctic of a lease to the Oliver, in consideration of the secret agreement on the part of the Oliver to give to it, at cost and with no substantial risk, one-quarter of the ore which should be mined upon the property. Thereafter no opposition was made by Mr. Mather. On the contrary, the testimony is clear to the effect that the first draft of the proposed lease to the Oliver was made at Cleveland, Ohio, in the office of James H. Hoyt, a

director and the counsel of the Cliffs company, and with his active participation in the drafting of the instrument. (See Rec., pp. 230, 351, 265, 281, 360).

4. The finding of fact set out in paragraph 4, subdivision (5) "It was further provided that by notice * * * the Cliffs could limit the amount of ore which it would take under the contract during the then coming years," is, we submit, inaccurate.

The agreement between the Oliver company and Mather as Trustee provided that if Mather should be "unable or unwilling for any reason in any year to take *any part* or all of his proportion of the ore mined, the first party should be required at the option of said second party to purchase the same of such new corporation, at cost, on cars, at the mine." (Rec., Ex. A., p. 39). The new corporation here alluded to was the Regent Company, about to be organized by the Oliver and the Cliffs, to hold the lease about to be made by the Arctic. The Cliffs could, if it wished, refuse to take any action in any year, and thus entirely eliminate all mining and marketing risks for that year.

5. The finding of fact set out in paragraph 4, subdivision (5a):

> "The price so received by Kaufman and Breitung, $131,500 was twice the fair value of the one-fourth interest purchased, and the Oliver purchased the same, not because it otherwise desired such interest but because it was necessary to make the purchase at this price in order to get the lease from Kaufman and Breitung,"

is, we submit, erroneous.

The Oliver was just starting to acquire such non-bessemer properties and did acquire several at about this time for the purpose of producing steel by a comparatively new process from cheaper material than that used in the bessemer converter (Rec., pp. 586-7-8, 590-1, 593).

Mr. Gayley testified that he was indifferent whether they purchased it or not and thought it a pretty good investment

(Rec., Ex. A., p. 104), and both he and Clemson (who alone represented the Oliver in the transaction) testify that it was not a bad bargain for the Oliver (Rec., Ex. A., pp. 104, 118), in which they are corroborated by Dr. Hulst who examined the property for the Oliver (Rec., Ex. A., pp. 589, 590, 591, 592). Neither Breitung or Kaufman knew the Cliffs was to be interested in this purchase.

6. The finding of fact set out in paragraph 4, subdivision (6) of the petition for certiorari, that Mather "did not in any way mislead or deceive or defraud Kauffman and Breitung in the subject matter," is, we submit, erroneous.

There is no dispute in the testimony that the whole arrangement made between Mr. Mather, representing the Cleveland-Cliffs, and Messrs. Gayley and Clemson, representing the Oliver Company, was purposely and carefully concealed from the Kaufmans and Mr. Breitung, because it was feared that if those persons learned of the transaction and the interest which the Cliffs would have in the ore, the arrangement could not be carried through. (See Rec., pp. 94, 95, 115, 363).

Further, it is clear that a preliminary agreement, embodying the terms ultimately carried out, was made some time in January or February between the Oliver and the Cliffs interests (Ex. A., Rec., p. 372). and that prior to the formal agreement of March 10th, above quoted from with reference to the right of the Cliffs not to take ore, the letters set out on pages 361 and 362 of the record—one by Mr. Mather and one by the representative of the Oliver company—were purposely so drawn that the letter from Mr. Mather did not contain any suggestion that his company was to acquire one-quarter of the ore at cost, and that this was done in order that if the Oliver had to exhibit Mr. Mather's letter to Messrs. Kaufman and Breitung, the latter would have no suspicion of the true state of affairs (Rec., p. 362).

7. The finding set out in paragraph 4, subdivision (7) of the petition for certiorari, that "It would have been impossible for Mather to have procured for the Arctic this

concession of one-quarter of the ore at cost, which was procured for the Cliffs," is, we submit, erroneous.

Mr. Mather testified that the other owners of the Arctic might, he supposed, have had like terms of the Cliffs as to ore if they had wanted them. (Ex. A., Rec., p. 329), and that they were entitled to it, if they wanted it (Rec., Ex. A., p. 329). It did not occur to him that the Cliffs had any superior right to the ore or that it would have been impossible to have obtained it for the balance of the Arctic stockholders.

8. The finding of fact set out in paragraph 4, subdivision (8) of the petition for certiorari, as follows: "The substitution as its traffic debtor of a corporation in the control of a competitor for a corporation controlled by itself," stated as one of the disadvantages to the Cliffs from the arrangement made, is, we submit, unwarranted.

The traffic contract spoken of is one made by the Queen Group of mines on the one hand and the Lake Superior & Ishpeming Railroad Company on the other, whereby all the traffic of the Queen mines was to pass over the railroad and a certain rate was fixed per ton of ore carried. The Queen mines, as has been stated, could not be operated under the existing leases, and the railroad got very little, if any, traffic at all. The Regent Company, being in effect substituted for the Queen mines under the new lease, operated the mines largely and delivered a large volume of traffic to the Railroad Company. The Cliffs was a large stockholder in the Railroad Company, and an arrangement existed whereby at the end of a certain period it was to have additional stock in said company proportional to the amount of tonnage which it furnished or caused to be furnished to be carried (Rec., Ex. A., p. 287). The fact that in a certain sense the Oliver Company was a competitor of the Cliffs Company, as a producer of ore, is, in view of the arrangements made between the companies as to this group of mines, we submit, of no consequence whatever.

9. The finding of fact set out in paragraph 4, subdivision (1) of the petition for certiorari, "These disbursements

were entered by Healy on his books as dividends, but were made without any action of the directors," is, we submit, as stated, not warranted by the testimony.

The stock of the Arctic Company when it was organized was held, half by the Healy family, and half by the Breitung family. Healy was secretary and treasurer. He was called as a witness by the defendants below and produced the corporate records. It was the Healy stock which was sold to the Cleveland-Cliffs. A by-law of the company, found on page 423 of the printed record, contains this provision:

> "While the present stockholders retain their stock without change, the present treasurer my make dividends to the stockholders without any formal vote of the directors."

10. The conclusion set out in paragraph 4, subdivision (9) of the petition for certiorari, is, we submit, one which should not be drawn from the record. In the view of the case taken by the Court of Appeals Mr. Mather's conduct is of very high importance to the controversy. Inasmuch as that Court appears to have reached a distinctly different conclusion upon the facts from the conclusions reached by the two district judges, who, as above explained, heard the case at different stages of its progress, and one of whom (Judge Knappen) is now a member of that court, but who did not sit in this case on appeal, it is obvious that the Arctic Iron Company will be prejudiced unless it is granted the opportunity to have the whole record brought into this Court, to the end that this Court may exercise its own judgment upon this question. That Company is interested in this litigation to the extent of about $1,000,000.

Of the five judges who have studied the case, three seem to have reached one conclusion upon the important fact of Mr. Mather's conduct, and two an opposite conclusion. In such a situation, we respectfully submit that justice demands that the case be reviewed upon the merits in this Court.

11. We have attempted to state, as briefly as possible, some of the reasons why we feel compelled to make the application

made by us. It is impossible, within the limits which we believe should be observed in discussing an application of this kind, to set forth any considerable part of the complicated facts involved in the controversy. We have not attempted to discuss at all the somewhat difficult questions of law arising on this record.

We trust that it will appear to the Court, from examination of these papers, that, if we are right in our contention as to the facts, and if the judges of the district court were right in their conclusions as to the facts, some, at least, of the questions propounded to this court by the circuit court of appeals, are not of controlling importance, if indeed they would need answer at all, and, further, that complete justice can be done only if the whole record is before the Court for its examination and review.

It is respectfully urged that the application be granted.

S. W. Rush.....

A. A. Angell.....

Counsel for Arctic Iron Company, Appellee.

No. 75

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In the Supreme Court of the United States

OCTOBER TERM, 1916.

THE CLEVELAND-CLIFFS IRON COMPANY and WILLIAM G. MATHER,

vs.

THE ARCTIC IRON COMPANY.

BRIEF ON BEHALF OF THE CLEVELAND-CLIFFS IRON COMPANY AND WILLIAM G. MATHER

In Opposition to Motion and Petition for Writ of Certiorari by The Arctic Iron Company.

HORACE ANDREWS,
W. P. BELDEN,
A. C. DUSTIN,
Solicitors for The Cleveland-Cliffs Iron Company and William G. Mather.

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BRIEF ON BEHALF OF THE CLEVELAND-CLIFFS IRON COMPANY AND WILLIAM G. MATHER

In Opposition to Motion and Petition for Writ of Certiorari by The Arctic Iron Company.

On November 24, 1916, there was filed in this Court, under the authority of Section 239 of the Judicial Code, a Certificate of the Circuit Court of Appeals for the Sixth Circuit, requesting instructions of this Court upon certain questions of law arising in this case. The Certificate includes a statement of facts, as required by Rule 37 of this Court.

On January 2, 1917, The Cleveland-Cliffs Iron Company and William G. Mather, Appellants below, filed herein a motion to have said cause advanced. About the same time The Arctic Iron Company, the Appellee below, notified Appellants that Appellee proposed to apply to this Court to have the whole record and cause sent up to this Court for its consideration as authorized by the above named Section of the Judicial Code and the Rule above referred to.

Thereupon, upon request of counsel for Appellee, the submission of said motion to advance was delayed until Appellee's application to bring up the whole record, with accompanying papers, could be prepared, so that both might be submitted to this Court at the same time. This preliminary statement is made in explanation of the delay in the submission of the motion to advance.

APPELLEE DOES NOT MAKE OUT A CASE WHERE THIS COURT WILL TAKE JURISDICTION TO REVIEW ON THE MERITS THE WHOLE CASE MADE IN THE COURT BELOW.

The case has been pending since June, 1904. We agree with counsel for Appellee (his application, p. 14) that the pleadings were long and the facts complicated. The printed record in the Circuit Court of Appeals contained nearly 700 pages, and the briefs filed over 470 pages. There were many questions of law and fact to be studied and settled. All questions involved, however, except only the questions of law propounded to this Court, have been resolved by the Circuit Court of Appeals to its entire satisfaction, as appears from the Certificate filed in this Court (see last paragraph), reading as follows:

> "We have considered—and reached a conclusion concerning—several issues of law not covered by any questions certified, and several issues of fact not mentioned herein."

It is obvious, therefore, that if the questions propounded by the Circuit Court of Appeals are answered that Court will proceed with the minimum of further consideration to the final determination of the entire case. It is equally obvious that the granting of Appellee's application will involve the re-argument and consideration by this Court of all such questions *de novo*.

We are unable to find that this Court has formulated any general rules or principles governing the allowance or disallowance of applications of this kind.

As the clear purpose of Congress in creating the Circuit Court of Appeals and vesting it with final jurisdiction in a large class of cases was to relieve this Court of the labor of reviewing such cases on the merits, it would seem that a very strong showing should be made

before this Court will consent to assume the burden of reviewing questions of both law and fact concededly numerous and complicated, which have already been fully considered and settled in the Court below.

The ordinary writ of certiorari is provided for in Section 240 of the Judicial Code, and Appellee's application is made under Section 239. Section 251 (applicable to the Court of Appeals of the District of Columbia). incorporates both proceedings in *one* section. The object to be accomplished is the same in both proceedings, the review of the whole case as on error or appeal. It would seem, therefore, as if the allowance or refusal of the application would in both cases be governed by similar considerations.

If we consult the decisions of this Court upon applications for the ordinary writ of certiorari, we find that this Court will consent to review the proceedings in the lower court only when the questions involved are of great public importance, and even then only when clear error has been committed by an inferior court. The limitations of the exercise of such discretionary supervision by this Court are well set forth in the decisions.

Am. Construction Co. vs. Railway Co., 148 U. S. 372, 383.
Forsyth vs. Hammond, 166 U. S. 506, 514.
McMullen vs. Hoffman, 174 U. S. 639, 645.
St. Louis, K. C. & C. R. Co. vs. Wabash R. Co., 217 U. S. 247, 251.

If, therefore, we look to those considerations which determine the action of this Court when considering applications for the ordinary writ of certiorari, there would seem to be no ground and no analogy upon which to rest the application of the Appellee in the case at bar. There are no averments sufficient to warrant this court taking jurisdiction.

If we construe the specific provisions of Section 239, under which this application is made, as contemplating something more than the application for the ordinary writ of certiorari, we are equally unable to conceive of any ground for bringing up this whole case for review.

Appellee does not claim that the questions of law propounded are not clearly stated, or that they are not germane to a proper decision of the case in the lower court, or that the supporting facts set forth in the Certificate filed in this Court are in any wise indefinite and uncertain, or that they are insufficient to enable this Court to answer the questions prepounded, but sets forth as we will later point out, as the *sole* ground why this Court should take jurisdiction and review the whole case that certain of the facts found and certified were "*erroneously*" found; that is, *are against the weight of the evidence.*

This Court has said by way of warning to the inferior courts in framing interrogatories:

> "Care must always be taken that under the guise of certifying questions the courts of appeal do not transmit the whole case to us for consideration."
>
> *Warner vs. New Orleans*, 167 U. S. 467.

Or, as put by the Circuit Court of Appeals for the Second Circuit:

> "The practice of certification is intended to be availed of only when the certifying court is in doubt about the specific question or questions asked * * *. It ought not to be availed of as an 'allowance of appeal' whereby questions about which the certifying court had no difficulty in making up its mind may nevertheless be passed over to the Supreme Court for decision."
>
> *Sigafus vs. Porter*, 85 Fed. 689.

Section 239 is primarily intended to enable the Circuit Court of Appeals to obtain the instruction of this Court upon questions of law which it cannot decide, to the end that that Court may dispose of the entire case. It was not designed to take away or limit the final jurisdiction of the Circuit Court of Appeals. We submit, in general, and by analogy with the practice in ordinary certiorari cases, that this Court, while confessedly having the authority to order up the whole record, should decline to do so unless the case involves propositions of the character and importance required for the issuance of the writ of certiorari in the ordinary case. Cases involving questions of lesser importance may perhaps arise, as, for instance, when the statement of facts accompanying the request for instructions is so deficient as to make an answer to the questions impossible, or at least very difficult. Other extreme cases may also be imagined where the court might exercise the discretionary power contemplated by the last clause of the Section under consideration. Wherever the limits of the willingness of this Court to review cases may begin or end, it is inconceivable to us, however, that it would ever feel itself called upon to undertake such review upon the *claim that the findings of fact accompanying the questions certified are erroneous because not in accordance with the weight of the testimony.*

How eager and persistent dissatisfied litigants are to get a re-consideration of their cases is well known. Congress, in order to lighten the labor of the higher courts, is constantly restricting the right of review. The rapid growth of applications for ordinary writs of certiorari has shown the necessity of imposing further limitations well illustrated by the late case of *Furniss, Withy & Co., Ltd., vs. Yang-Tsze Ins. Ass'n, Ltd.,* decided by this Court January 8, 1917 (not yet reported).

To hold, therefore, that the facts certified here may be inquired into to ascertain if they are supported by the weight of evidence and in case of doubt that the whole case should be certified here for review, would establish a rule of practice that would open the door for such an application in practically every case when questions are asked of this Court, as in most cases ultimate facts rest on disputed testimony.

We submit that such is not the purpose of the clause contained in Section 239 now under consideration, and that the application should be denied.

THE FACTS FOUND ARE SUPPORTED BY THE WEIGHT OF THE EVIDENCE.

We now turn to the specific complaints made by the Appellee of certain facts found by the Circuit Court of Appeals. These complaints are ten in number (see pp. 6-11).

As preliminary to the discussion we wish to call the Court's attention to the fact that while the application to have the whole record sent up (the petition for the writ of certiorari) sets forth that the facts complained of are "unwarranted" which ordinarily means unsupported by any evidence, the brief filed in support thereof contends only that such findings are "erroneous," that is against the weight of the evidence.

We shall refer to the printed Certificate from the Circuit Court of Appeals as "Record" or "Rec.," and the record in the Circuit Court of Appeals, filed herein with Appellee's application, as required by Rule 37, as "Exhibit A."

We will consider first Appellee's so-called "Outline of the controversy" (see his brief, pp. 14-16). It is very brief and in places inaccurate. We will not burden the Court with a new statement, but will content ourselves with pointing out the inaccuracies in the statement made by Appellee.

The contract with the Oliver Company was not made by "defendant Mather, then a director, etc.," as set forth at bottom of page 14, but by the Cliffs Company (Record p. 5, Par. (9)). In the making of this contract the Cliffs was represented by its president Mather, as was well known to Breitung and Kaufman (Record pp. 7-8, Par. (15)).

The statement found at the top of page 15 of Appellee's brief is inaccurate. The four Corrigan leases were held by the Cliffs Company not only as security for

a loan which was not due for several years, but also as security for traffic contracts, which had many years yet to run. The traffic contracts contained conditions for additional tonnage which would of necessity end with the release of the Queen Co. (Rec. pp. 2-3, Par. (5)). Instead of these leases being a "burden on the lessees" they were of great value. Three of them had been acquired by the Corrigan interests four years before at an aggregate cost of $293,000 (Ex. A, pp. 664-667). From 1899 to 1910 the fourth lease (the Blue.) produced 2,386,-778 tons, as against 1,100,000 from the other three (Ex. A., p. 536), so that the total cash value of the four leases in 1894 must have been well over $500,000. Had they been retained on the property, and not cancelled, and the mines thereon worked and operated as they were in fact actually worked and operated under the Oliver lease, Corrigan would have realized therefrom a net profit, above expenses of operation and royalties, during the life of these leases of over one million two hundred thousand dollars (Ex. A., pp. 536-538). Nor is it true that Corrigan was "trying to get rid of these leases." He was endeavoring to sell them (Rec. p. 3, Par. (6)), and actually succeeded in obtaining therefor over $250,000 in cash and 100,000 tons of ore, worth over $100,000 (Ex. A. pp. 96, 105, 293; Rec. p. 6, Par. (13)).

The statement in the last paragraph but one on page 15 is erroneous. The Oliver Company never tried to get the consent of Mather to the Arctic giving it a lease, but the Oliver did ask the Cliffs Company to consent to allow the old leases to be cancelled, and to consent to a new lease to the Oliver Company (Ex. A., last Par. p. 291). The "Record" recites accurately what took place. Counsel refers in the same paragraph as a matter of little consequence to "some personal feeling between the parties." This hostility of Breitung and Kaufman toward Mather

was one of the striking and important facts in the case. It manifested itself in various ways. It prevented all co-operation and dealing between them. Kaufman joined Corrigan and threatened to force the property to partition and sale unless the Cliffs Company yielded to Breitung and Kaufman's demands and allowed them to complete the new lease they had promised to Oliver through Corrigan (Ex. A., pp. 146, 183-184, 100). Judge Burke, a member of Corrigan's firm, made similar threats. Gayley, the president of the Oliver Company, wrote the Cliffs that all arrangements had been made with Breitung and Kaufman (Ex. A., pp. 100, 113-114, 117, 293, 295, 267-269) to proceed by partition and ignore the Cliffs. Congdon, the attorney of the Oliver Company, one of the Arctic Company's own witnesses, pointedly described this hostility in the following words:

(Direct examination):

"There was a conversation between me and Mr. Hoyt. I told Mr. Hoyt, in my opinion, by reason of the bitter feeling between Breitung and Kaufman on the one hand and the Cleveland-Cliffs on the other, which was largely on account of Breitung and Kaufman, in my judgment if they knew the Cliffs Company had any interest in the deal we could not get it, and I requested him to be very careful and not make any statements to Mr. Eldredge (Breitung and Kaufman's attorney) that would let him know that fact. I want to explain here that the hostility between these parties was almost childish in its nature, in my judgment, and it was more for the purpose of displaying their hostility to these people that they had objections to their being in the deal than for any other purpose." (Ex. A., p. 363).

(Cross-examination):

"Q. Before going to Mr. Hoyt's office you had had a conversation with Breitung and Kaufman, you say, as to their feeling against the Cleveland-Cliffs Iron Company, which you described as childish; is that correct?

"A. Yes. I was satisfied from their conversation that they would not lease their property to the Cleveland-Cliffs at any royalty; that they had a prejudice against the Cleveland-Cliffs which would prevent their doing business with them at all. They convinced me of that fact. I cannot quote their language, but they said things which convinced me of that fact. * * * That is the reason I was concealing the fact—doing my best to conceal the fact—and advising my clients, Messrs. Gayley and Clemson (the officers of the Oliver Company) not to say anything about it (Exhibit A., pp. 369-370).

The inadvisability of leasing to the Cliffs because of possible conflict of interest growing out of its part ownership of the Arctic is set forth in the last paragraph but one on page 15 of Appellee's brief. This idea, while argued by counsel for Appelle in both the lower courts, had *no* evidence to sustain it. Neither Breitung nor Kaufman assigned that as a reason, but, on the contrary, claimed they had gone too far with Oliver to consider any one else. (Ex. A., pp. 292, 186, 546, 547, 548, 101.) That this alleged conflict of interest had nothing to do with this refusal was further shown by the fact that there was an agreement by Breitung and Kaufman (never in fact carried out), at the very time the Oliver lease was under consideration, to lease to the Cliffs other tracts of land in which the Arctic was interested (Ex. A., pp. 272-274, 127, 283-284, 350-351, 289, 302, 381). Appellee's reference to page 488 in Exhibit A is *not to the testimony* but to the opinion of the district court, that Breitung and Kaufman, while influenced by personal motives, were nevertheless justified in their refusal to make a lease to the Cliffs upon the other ground. This finding would have been more appropriate if there had been *some* evidence on the subject. The Circuit Court of Appeals put Breitung and Kaufman's refusal to make such lease to the Cliffs Company on the only ground shown by the evidence—hostility.

The statement contained in the last paragraph of page 15, extending over onto page 16 of Appellee's brief, is both erroneous and misleading. Mather made no contract whatever with the Oliver Company. The Cliffs did agree with the Oliver that in the event Oliver and Breitung could agree on a lease, to surrender its control of the Corrigan leases, and its interest therein, accept payment of the debt before maturity and consent to a novation of the traffic contracts, and allow such new lease to be executed (Rec. p. 5, Pars. (9) and (10)). This agreement, if and when carried out, involved not only the surrender of the rights mentioned, but the taking on of large new risks (Rec. p. 8, Par. (17) and (18)).

We will now proceed to examine the facts specifically set up in the petition for the writ of certiorari and brief of Appellee's counsel.

(1) **Brief, page 16.**

The first finding of fact alleged to be erroneous is a part of a sentence taken from the centre of Par. (8), p. 4 of the "Record," and should, for a proper understanding, be read in connection therewith, as well as certain other facts found.

In Par. (3), page 2 of the Record (not complained of) the Court found:

> "In 1898 and 1899, the Cliffs and the Oliver were the chief operators in the Marquette region and were the natural and the leading competitors for any mining leases which might be offered. That is to say, the owner of iron ore had the choice between mining, called operating, and offering it for lease to those in the business of operating, reserving a royalty for himself. Such leases were in very common use, and while their details differed, the essentials were three: **1, the amount of royalty per ton; 2, the** minimum tonnage guaranteed for each year; and, 3, the cash bonus sometimes paid by the lessee for the privilege of getting the lease upon its fixed terms."

It was the fixed policy of Breitung and Kaufman for themselves and the Arctic to lease their lands upon a royalty basis and not take the risks of mining. (Rec. Par. (17), p. 8). The complete sentence of Par. (8), p. 4, is as follows:

> "Each offering company, the Cliffs and the Oliver, was of the highest standing, both financially and for integrity and fairness and for skill in mining, and save for the terms which might be offered, *there was no reason for preferring one to the other as lessee; but, by reason of personal feeling held by Kaufman and Breitung, or one of them, against Mather, they had a fixed determination not to lease to the Cliffs nor permit the Arctic to do so,* but rather to lease to the Oliver, if, and as soon as, they could get from it satisfactory terms."

(We have italicized the part quoted and complained of in counsel's brief.)

We have already shown that this finding was supported by the evidence.

(2) **Brief, page 17.**

The second finding of fact complained of is thus stated by counsel:

> "The finding * * * that Messrs. Kaufman and Breitung knew that 'the deal for a new lease involved the payment by the Oliver of about $100,000 to Corrigan, McKinney & Co. for interests of the Queen, etc. * * *' is erroneous, and, we submit, quite in contradiction of the testimony."

We understand that the complaint here is not to the finding that Corrigan received a consideration, or the correctness of the finding of the amount paid to Corrigan by the Oliver, but solely to the statement that Breitung and Kaufman had knowledge of the amount so paid (see their brief, p. 7, Par. No. (3)).

As a matter of fact, Corrigan's contract with the Oliver required that Oliver should pay upwards of

$250,000 in cash—enough to pay Corrigan's debt to the Cliffs Company—and should also assume the traffic contracts, and deliver to Corrigan 100,000 tons of ore, worth about $100,000 (Ex. A., pp. 96, 105; Record, pp. 2-3, Par. (5), and Record, p. 6, Par. (13)).

If this finding (Record, p. 4, Par. (8)) is read as a whole it conveys quite a different meaning than when a part is selected and read separately from the context. Whether Breitung and Kaufman knew the *exact* sum Oliver was paying to Corrigan for the leases is a matter of little consequence. They did know that Corrigan's Company had borrowed $250,000 from the Cliffs and had entered into traffic contracts with a railroad controlled by the Cliffs, and had assigned the existing leases on the property as security. They knew Corrigan was desirous of selling his leases and had approached Oliver and others on the subject. They also knew that Oliver had agreed with Corrigan to buy out their interest in those leases, which included the payment of the debt to the Cliffs Company (Ex. A., pp. 142-143, 146-148, 178-179, 181, 189, 197-198). They even themselves considered the question of buying out Corrigan's leases and themselves embarking in the mining business upon that same property, but decided that the risks were too great and therefore said nothing to Mr. Mather or the Cleveland-Cliffs on the subject (Ex. A., pp. 546, 547-548).

Appellee's counsel, in connection with this finding complained of makes the statement following:

> "The whole arrangement made in behalf of the Cliffs by Mr. Mather with the representatives of the Oliver Company was carefully and purposely concealed from the other owners of the Arctic stock. The testimony on the part of plaintiff is clear as to this, and there is no testimony on the part of defendants to the contrary." (Citing many pages of Ex. A.)

This statement, when coupled with what just preceded it, confuses the "arrangement" that the Cliffs and the Oliver made with the "arrangement" between the Oliver and Corrigan. The Oliver, having agreed with Breitung and Kaufman substantially on the terms of a new lease, knew it must arrange for the cancellation or surrender of the Corrigan leases. Both Corrigan and the Cliffs were interested in those leases, and the consent of *both* was necessary. The Oliver, therefore, negotiated separately with them. The terms demanded by Corrigan were early stated and known to every one, as we have just pointed out. In the negotiations the Oliver had with the Cliffs, it developed that the Cliffs would not consent to the Corrigan leases being cancelled—would not accept payment of their debt before it was due, and permit a complete change and novation of the traffic contracts—and allow Breitung and Kaufman to go ahead and make the lease with the Olivers they had agreed upon, except upon the condition that the Cliffs should have one-quarter of the ore at cost (Rec. p. 5, Par. (9) and (10)). Breitung and Kaufman knew of the Cliffs interest and control of the Corrigan leases and that Mather was acting for the Cliffs in the deal between the Cliffs and Oliver (Rec. p. 7, Par. (15)), but they were not told that the Cliffs had bargained for a quarter of the ore. This fact (not "the whole arrangement") was not disclosed.

Mr. Congdon, the attorney for the Oliver Company (one of the Arctic's witnesses), as heretofore shown, was responsible for this (Ex. A., pp. 363, 369-370). The Circuit Court of Appeals, in their statement (Rec. p. 5, Par. (11)) certainly found the facts as strong as the evidence warranted. In fact, Appellants could more justly complain than Appellee of this finding. It was not Mather or the Cliffs, but *Congdon* who requested that disclosure should not be made (Ex. A., pp. 363, 369-370).

We might add that there was evidence tending to show that Mr. Eldredge, attorney for Breitung and Kaufman, was advised of the fact that the Cliffs Company was expecting to be interested in the Oliver lease (Ex. A., pp. 274, 363), but the weight of the evidence was to the contrary and the Circuit Court of Appeals so found (Rec. Par. (11), p. 5).

(3) **Brief, page 17.**

After the Oliver had received Corrigan's proposition it first negotiated with Breitung and Kaufman, who agreed that Oliver should have the new lease on 15 cent ton royalty if the other terms as to minimum, etc., were satisfactory (Record, p. 4, Par. (8)). The Oliver then approached the Cliffs. There were three interviews between these two companies, two in Cleveland and one in Pittsburgh (Ex. A., pp. 290, 294, 297-298). When these two parties had completed their agreement, the president of the Oliver Company telegraphed to Kaufman:

> "Have closed with Mather. What is the earliest possible date you can meet us here with Breitung and counsel." (Ex. A., p. 246.)

Mr. Congdon, the attorney for the Oliver Company, one of complainant's witnesses, said that Breitung and Kaufman and their attorney Eldredge had met Gayley and Clemson (officers of the Oliver) in Pittsburgh, and that he was telegraphed in New York to meet them the next day in Cleveland; that that was the beginning of his negotiations with Breitung and Kaufman, but that previous negotiations had been conducted by Gayley and Clemson (Ex. A., p. 368); that he, as attorney for the Oliver, and Mr. Eldredge, the attorney for Breitung and Kaufman, began negotiations at the hotel in Cleveland; that a tentative form of lease was gotten out on slips of paper attached to a form of lease; and that they

then went to Mr. Hoyt's office to prepare the lease (Ex. A., pp. 369-370). He says:

> "I did not discuss in Mr. Hoyt's office the details of the lease. The deal was made before we went to Mr. Hoyt's office. We went to Mr. Hoyt's office to prepare,—the deal, or matter that was discussed that day was entirely directed to the form of the lease which would carry out the deal which had been made—" (Ex. A., p. 370.)

Mr. Hoyt, the then attorney of the Cliffs Company, testified also very fully on the subject (Ex. A., pp. 271-274, 280-282). Considerable time was devoted to the drawing of this lease, as the minimum royalty feature was the most complicated ever devised (Ex. A., p. 367). After the preliminary draft of the lease was made in Cleveland, Mr. Congdon met Mr. Eldredge and Mr. Shaull (Breitung's personal attorney) at Marquette, and also at Chicago, where modifications of the lease were made (Ex. A., bottom p. 363). It is Congdon's opinion that the final changes in that lease "were agreed upon definitely in Marquette." (Ex. A., p. 365.)

The Pioneer Iron Company (the stock of which was owned by the Cliffs) owned a half interest in one of the parcels of land. This was one of the things Mr. Hoyt was specially looking after (Ex. A., pp. 273-274, 301-302), and is one of the "details" referred to by the Court below as "remote" (Rec. p. 6, Par. (12)).

(4) **Brief, page 18.**

Appellee's counsel is here in reality complaining of the legal construction of a certain paragraph in the contract made between the Oliver Company and the Cliffs Company, dated March 10, 1899. The clause referred to is paragraph 7 of Exhibit A, page 39, reincorporated later in the contract between the Regent Company and the Cliffs Company as paragraph 4, Ex. A, p. 45. The first contract was tentative in character, entered into

before it was definitely determined whether Breitung and Kaufman and the Oliver could agree definitely upon all the terms of a lease, and was to become effective only in the event such agreement was made. It provided for the organization of a corporation to be known as the Regent Company, to work these mines under the new lease, the capital to be furnished and owned three-fourths by the Oliver and one-fourth by the Cliffs. It provided that of the seven directors, the Oliver should name five, each party to take his proportion of the ore f. o. b. mines at cost. As the purpose of the acquisition of these mines by the Oliver Company was to provide a supply of this grade of ore for the Carnegie Steel Company (Ex. A, pp. 587-588) mining operations each year would be determined wholly by the business necessities of the Carnegie Steel Company. The lease which it was proposed to secure, and which actually was secured, imposed no obligations to mine (Ex. A, pp. 20 et seq.) but in lieu thereof provided for minimum advance royalties when no mining was done, amounting to $37,500 per year. If neither party wanted ore, the mines would lie idle and the two parties would proportionately provide the minimum royalty as well as the other fixed expenses and taxes necessary to carry the property. It might very well happen that the Carnegie Steel Company, which was a consuming corporation, might need ore in some years when the Cliffs Company, which was a selling organization, would prefer that the mines should remain idle. In view of this condition of things, and the control of the Regent Company's operations vested absolutely in the Oliver Company, it was provided that the Cliffs Company should have the right to notify the Oliver Company, by a certain time each year, whether it wanted ore or not, and how much, whereupon the Regent Company, in control of the Oliver, would mine only the quantity of ore wanted.

This was all fully explained by Mr. Hoyt, who, as attorney for the Cliffs Company, assisted in the preparation of both contracts (Ex. A, p. 275), where he says:

> "It was my understanding that if the Cleveland-Cliffs Iron Company gave notice, the Regent Company would mine only the quantity of ore that the Olivers wanted."

This finding which is found in paragraph (13) Record, p. 6, must, for a proper understanding, be read not only in connection with what precedes and follows it in that particular paragraph, but also should be read in connection with paragraph (17) found on page 8 of the Record, where the Circuit Court of Appeals stated that the Cliffs Company, by serving this advance notice in any year could only minimize but could not escape the risks of mining. This was manifestly true. Under its contract with the Oliver it was obligated to make good its proportion of all losses and charges in the event for any reason in any year mining operations were curtailed or the mine was closed down altogether.

In fact, the Cliffs Company did not always make profits. In 1889, it lost $14,806.64, and in 1908 it lost $18,774.93 (Ex. A, p. 535).

(5) **Brief, page 18.**

The Oliver Company, in desiring to secure the iron ore from the Queen Group of lands, was undoubtedly prompted by its knowledge of the increasing use of the open hearth process in steel making in place of the Bessemer process, the former permitting the use of grades of ore not usable under the latter process. *Counsel, however, wholly misconceives the point.* That idea is not the one covered by the finding. The Oliver was not seeking to *buy* land but to take a lease, and Breitung and Kaufman (Officers and directors of the Arctic) in negotiating for such a lease interposed as a condition to such lease

that the Oliver should buy some of their individual property at *twice* what it was worth. In short, Breitung and Kaufman, the owners of one-half of the Arctic and officers of that corporation, were themselves doing the very thing that they complained of in defendants. The fact that the price exacted by Breitung and Kaufman ($131,500) was twice what the land was worth was found by the Master who took the accounting (Ex. A, pp. 615-623), and was clearly supported by the evidence (Ex. A, pp. 299-300, 327).

(6) **Brief, page 19.**

The bill of complaint charged that Mather and the Cliffs Company conspired together to wrong and defraud the Arctic Company, and that Mather, while acting as one of the officers of the Arctic Company negotiating the lease on its behalf took advantage of his official position to demand and exact from the Oliver Company a bonus or bribe for his own benefit and the benefit of the Cliffs Company. These allegations were denied in the answers of both defendants (Ex. A. pp 64-89). This issue of fact was squarely before both lower courts. The district court made no finding as to actual fraud either way. Its decree rested entirely upon constructive fraud, growing out of Mather's relation as director and officer of the Arctic Company.

It would hardly be proper at this time for us to call attention to the facts and conclusions of law contained in the opinion of the district court with which we did not agree. Those were all pointed out and elaborately discussed in the briefs filed in the Circuit Court of Appeals. In both the pleadings and evidence the issue was squarely made, first, as to *who* negotiated the lease, and, second (it having been established by the evidence that this negotiation was wholly carried on by Breitung and Kaufman),

whether *they were in any manner influenced in their judgment as to the making of such lease by Mather* whether he misled them in any respect whatever. While Breitung and Kaufman tried to make it appear that there was some influence exerted upon them, the evidence was clearly to the contrary. In fact, they had agreed to give this lease to the Oliver Company, and had set forth the tonnage royalties (Record, p. 4, par. (8)) even before the Cliffs became a stockholder, and before Mather was an officer of the Arctic Company. (Ex. A, pp. 197-200.) It developed that when they encountered opposition from the Cliffs Company to their carrying through the plan of making this lease, that they and Corrigan and the officers of the Oliver Company all united in threatening all kinds of litigation against the Cliffs Company *if Breitung and Kaufman's plans to make this lease were obstructed in any way.* Breitung and Kaufman knew all about the Cliffs' rights in the existing Corrigan leases, and that Oliver was proposing to deal with Corrigan and buy out his rights, and the Cliffs Company and buy out its rights, and Breitung and Kaufman were fully notified that the Oliver's negotiations had resulted in an agreement which contemplated that any lease which Breitung and Kaufman desired to effect with the Oliver would be executed (Record, p. 5, par. (9), (10).) The evidence established clearly that Breitung and Kaufman were not misled or defrauded in any way; they negotiated and settled just the lease they wanted as affecting their three-quarter interest in the property without influence from Mather or anybody else. The only thing that Breitung and Kaufman did not know was that Oliver and the Cliffs had agreed that the Cliffs should have one-quarter of the ore at cost. The Circuit Court of Appeals makes a definite finding on this point (Rec., p. 5, par. (11)). The reason why this fact was not disclosed has already been discussed.

Whether, under the peculiar facts of this case there was constructive fraud growing out of the relation of the parties is one of the things covered by the questions certified.

(7) **Brief, pages 19 and 20.**

Several reasons are assigned by the Circuit Court of Appeals why Mather as an officer and director of the Arctic could not have secured the quarter interest in the ore for the Arctic (Rec., p. 8, par. (17)). It is manifest that he could not lawfully make use of the property interests of the Cliffs in the old leases for this purpose. But counsel here attempts, just as counsel did in the courts below, to develop the idea that Breitung and Kaufman as stockholders in the Arctic might have desired to be interested in ore, and that they ought to be on a parity with the Cliffs Company, another stockholder in that regard. The district Court made a finding on this subject (Ex. A, p. 487), as follows:

> "Manifestly, the Cleveland-Cliffs Company had no better right to mine ¼ of the ore than the Kaufmans and Breitung had; and the result of the action of the defendants is that the latter obtained the same rights as the other stockholders and the special profit besides. It would seem that defendants could directly or indirectly have obtained this special profit for complainant as easily as for themselves."

This finding later appeared to have been wholly unwarranted and was corrected on appeal. *After* the decision of the District Court in support of the accounting complainants called Breitung again as a witness. From his evidence it then appeared for the first time that he and Kaufman, knowing that the Corrigan leases were for sale, had fully considered the question of buying such leases and had reached the conclusion that they would continue the safe course theretofore followed by them and would

not take the risks of mining (Ex. A, pp. 546 last part direct examination 547-548).

As the Cliffs and Breitung and Kaufman owned together the *whole* fee, there was nothing to prevent their joining with the Cliffs and having not merely a part of one-quarter but a full three-quarters of the whole. *They could not, however, get this or any other proportion without buying the Corrigan leases and assuming the risks attendant on that kind of business, and it appeared from Breitung's evidence that they were not willing to do this.* The record disclosed that in the operations on this property—buying out the Corrigan leases and providing the necessary capital to properly carry on the business—called for an investment of a very large amount of money. The Cliffs, to buy and carry its one-quarter, had invested before the end of 1899 over $175,000. (Ex. A, pp. 639-640.) The finding made by the Circuit Court of Appeals was clearly justified by the evidence.

(8) **Brief, page 20.**

Criticism is made of (e) in the last sentence contained in Par. (18), page 8, of the Record, which contains a recital of the things the Cliffs Company received and the risks, ventures and possible chances of loss that it incurred in the contract it made with the Oliver Company. Just exactly what counsel complains of—whether the finding itself was unwarranted or whether the facts stated constitute a disadvantage—is not clear. Certainly the finding itself is justified. The Cliffs Company had negotiated the traffic contracts mentioned between the railroad, controlled by the Cliffs, and the Queen Company, under which the Cliffs acquired the control of the Queen Company leases. It, therefore, was in a position to *insure* the *performance* of these traffic contracts. On the other hand, when the Cliffs Company consented to a

cancellation of the Corrigan leases, and consented to release the Queen from the obligations of the traffic contracts, and accept, as a substitute, the agreement of the Regent Company, it parted with all *control* over the traffic except its one-quarter. It further lost the chance of the Queen becoming interested in other properties (Rec., p. 3, par. 15).

The question of damages, in the event of trouble was also important. The traffic contracts were between the railroad company and the Queen Company. *The Cliffs was not a party thereto.* Its *special* interest in the traffic contracts grew out of its *private arrangement* as a stockholder with *other stockholders of the railroad.* By this private arrangement, a considerable block of the stock of the railroad had been set aside to be distributed later as a stock dividend between the two stockholding interests in the railroad in *proportion to the tonnage that each brought to the railroad.* (Record, p. 3, par. (5)) Had the Regent Company, controlled by the Oliver, repudiated the traffic contract, the railroad company could have sued for damages, but, manifestly, the recovery would have been for the benefit of the railroad itself and limited to such damages as it sustained. The damages to the Cliffs Company in its private contract with the other stockholders of the railroad—the right to stock based on tonnage furnished could not have been recovered. So long, however, as the Corrigan leases were in the control of the Cliffs it could enforce *specific* performance, and *thus earn the stock as per its contract with the other stockholders in the railroad.* It gave up this right when it closed its contract with the Oliver.

The statement contained on page 20 of the brief:

> "The Queen mines * * * could not be operated under the existing leases and the railroad got little if any traffic at all,"

is surprising, in the light of the testimony. By March 10, 1898, the Queen Company had delivered to this railroad 219,147 tons of ore for transportation under the traffic contracts (Ex. A, p. 38). As the traffic contracts were made in April, 1897, (Ex. A, p. 252) this ore must have been transported during the summers of 1897 and 1898.

(9) **Brief, pages 20 and 21.**

The finding of fact that Healy made disbursements to stockholders by entering them upon books as dividends without any action of the directors is complained of as erroneous, and a by-law of the Company is cited as proof of this contention (see brief, pp. 20-21). The finding of the lower court was predicated on the testimony of Healy himself:

> "Q. What is the fact as to whether you simply collected the royalties, and without any further action except your own discretion, paid over one-half to yourself and your wife and one-half to the other side?
>
> A. That was what I did. I made an entry on the record book of the fact that I declared a dividend every time that I declared one, and I also kept a set of books—journal, ledger and cash book—Arctic books showing the amount I took in and paid out." (Ex. A, pp. 346-347).

The book itself was introduced (See Ex. A, bottom p. 432), wherein appears an entry which was substantially in the form in which they all appear:

> "January 31st, 1890.
>
> I hereby certify that on January 8, 1890, I declared a dividend of one dollar and twenty-five cents per share on the stock of the Arctic Iron Company and paid the same to the stockholders.
>
> W. P. Healy,
> Treasurer."

(10) **Brief, page 21.**

It is undoubtedly true that in some particulars the findings of fact of the district court were different from the findings of fact of the Circuit Court of Appeals. The case was tried before the district court upon depositions taken in typewriting form only, and upon typewritten briefs. The witnesses were not in open court. *On appeal in the Circuit Court of Appeals the evidence was carefully and elaborately compiled, and the briefs covered every possible phase of the case, and it was most elaborately presented.* The honesty in fact of William G. Mather was made a square issue in both courts. As heretofore pointed out the district court made no finding either way, and the decree of that court rested solely upon *constructive fraud based upon the relationship of parties.* The Circuit Court of Appeals has found the facts clearly and distinctly and in strict accordance with the great weight of the evidence. They have shown a most thorough and painstaking investigation of all the evidence. They have asked for the instructions of this Court upon certain questions of law based upon the peculiar relations of the stockholders and directors to each other in this corporation. The facts showing fully what these relations were, are set forth in the certificate. Counsel for Appellee does not contend that they are not full and complete, his only contention being that they are against the weight of the evidence. He is wrong in this. The evidence overwhelmingly sustains the facts found.

Some added force is attempted to be injected into this case on the theory that the judgment and finding of three judges of the Circuit Court of Appeals are to be put in a balance as against the findings and judgment of two district judges. Upon this subject, perhaps a word may be said. Some of the evidence taken before the Master (particularly the testimony of Breitung heretofore referred

to showing that the Breitung and Kaufman interest had fully considered the question of going into the mining business, and that they would not have consented in 1898 and 1899 to have taken the one-quarter interest the Cliffs took, with its risks and obligations, even if offered to them) seemed to warrant a motion that the case be opened up for further hearing, and one was made accordingly. The motive of defendant's counsel in presenting this motion was to meet the possible objection which might arise in the appellate court that this evidence should perhaps have been brought to the attention of the court below before final decree. In disposing of this motion, it appears that Judge Sessions followed the well known rule that the case having been fully heard on its merits ought not to be disturbed unless plainly satisfied that prejudicial error had been committed. He refused to place himself in the position of reviewing the judgment of his predecessor made after full hearing.

It appears, however, that Judge Sessions also examined into the merits of the case and overruled the motion, expressing the opinion that Judge Knappen was right.

We submit that nothing has been shown as sufficient ground for a review of this case upon the merits, and no reasons assigned why the Circuit Court of Appeals should not finally dispose of this case, upon answer to be given to the questions propounded to this Court.

Respectfully submitted,

W. P. BELDEN,
HORACE ANDREWS,
A. C. DUSTIN,
Solicitors for The Cleveland-Cliffs Iron Company and William G. Mather.

Office Supreme Court, U.S.
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In the Supreme Court of the United States

No. 787 [redacted]75

OCTOBER TERM, 1916.

CLEVELAND-CLIFFS IRON COMPANY and
WILLIAM G. MATHER,

vs.

THE ARCTIC IRON COMPANY.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

MOTION ON BEHALF OF CLEVELAND-CLIFFS IRON COMPANY AND WILLIAM G. MATHER TO ADVANCE.

NOTICE OF MOTION AND REASONS FOR ADVANCEMENT.

A. C. DUSTIN,
HORACE ANDREWS,
W. P. BELDEN,
Solicitors for Cleveland Cliffs Iron Company and William G. Mather.

In the Supreme Court of the United States

No. 787

October Term, 1916.

CLEVELAND-CLIFFS IRON COMPANY and
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THE ARCTIC IRON COMPANY.

Certificate from the Circuit Court of Appeals
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MOTION ON BEHALF OF CLEVELAND-CLIFFS IRON COMPANY AND WILLIAM G. MATHER TO ADVANCE.

Now come the Cleveland-Cliffs Iron Company and William G. Mather, and respectfully move this Court to advance the above entitled case for an early hearing for the following reason, to-wit:

This case is one in which the United States Circuit Court of Appeals for the Sixth Circuit desires instructions as to certain questions of law in order to finally and definitely determine the case now pending before said Circuit Court of Appeals, and which said case will remain undisposed of on the docket of said Court until said questions are answered by this Court.

Said case involves property rights of great value, to-wit, over one million dollars.

Respectfully submitted,

Cleveland-Cliffs Iron Company and
William G. Mather,

By A. C. Dustin,
Horace Andrews,
W. P. Belden,
Their Attorneys.

NOTICE OF MOTION.

The Arctic Iron Company is hereby notified that the Cleveland-Cliffs Iron Company and William G. Mather will, on the 8th day of January, 1917, on the convening of the Supreme Court of the United States on that day, or as soon thereafter as a hearing may be had, submit for the consideration of said Court the foregoing motion, to-wit, a motion to advance this case for early hearing; all of which is now served upon you herewith.

A. C. DUSTIN,
HORACE ANDREWS,
W. P. BELDEN,
Attorneys for Cleveland-Cliffs Iron Company and William G. Mather.

Copy of the foregoing motion and notice is received this ..... day of December, 1916.

A. C. ANGELL,
S. W. SHAULL,
Attorneys for The Arctic Iron Company.

STATEMENT AND REASONS FOR ADVANCEMENT OF THE CASE.

This cause comes into this Court under the authority of Section 239 of the Judicial Code on the Certificate of the Circuit Court of Appeals for the Sixth Circuit, requesting instructions of this Court upon six questions of law arising in the case.

The case was heard on appeal to the lower court, and the evidence is voluminous, making a printed record of nearly 700 pages. It was submitted to said Circuit Court of Appeals, consisting of Judges Warrington, Denison and Sanford, on March 15, 1916, and certified to this Court under date of November 14, 1916. The money value of the decree below was about $900,000, and the property rights involved beyond that are of considerable value. The facts are quite complicated.

While we do not find any published Rule of this Court specifically providing for the advancement of cases of this character, nevertheless it is manifestly proper that such cases should be advanced, to the end that final disposition may be made of the case in the lower court at the earliest possible date while the case is familiar to the judges of said court, and with the least possible chance that there may be changes in the personnel of said court.

A. C. Dustin,
Horace Andrews,
W. P. Belden,
Attorneys for Cleveland-Cliffs Iron Company and William G. Mather.

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JAMES D. MAHER
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IN THE

Supreme Court of the United States

No. 75

October Term, 1916.

CLEVELAND-CLIFFS IRON COMPANY AND WILLIAM G. MATHER, APPELLANTS,
v.
THE ARCTIC IRON COMPANY, APPELLEE.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Brief in Opposition to Motion of Appellants to Advance the Hearing of the Cause.

S. W. Shaull,
Alexis C. Angell,
Counsel for The Arctic Iron Company.

IN THE

Supreme Court of the United States

No. 787.

October Term, 1916.

CLEVELAND-CLIFFS IRON COMPANY AND WILLIAM G. MATHER, APPELLANTS,

v.

THE ARCTIC IRON COMPANY, APPELLEE.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Brief in Opposition to Motion of Appellants to Advance the Hearing of the Cause.

The Arctic Iron Company, appellee, has filed in this Court and cause a motion and petition for Writ of Certiorari to bring up the whole record, and for the hearing of the cause as in case on appeal. This application is to be submitted on the day upon which the motion to advance is submitted. If the application of the Arctic Iron Company should be granted, there would appear to be no special reason why the motion to advance should be granted.

Apart from the foregoing considerations, it is submitted that there is nothing in this cause of a peculiar nature nor of any nature such as to require the displacement of other cases in order that it may be heard and decided. The questions of law certified by the Circuit Court of Appeals are difficult and somewhat obscure and such that ample time should be given to counsel if their briefs and arguments are to be of substantial assistance to the Court.

If this Court answers the questions propounded in the certificate, it is, we submit, of no consequence what men may constitute the Court when the answers are sent to the Circuit Court of Appeals.

It is, therefore, respectfully submitted that the motion of the Appellants to advance the cause should be denied.

S W Shaver

H C Hughes

Attorneys for the Arctic Iron Company.

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FILED
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CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1917.

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THE ARCTIC IRON COMPANY,

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W. P. BELDEN,
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form the agreements entered into by the stockholders as principals. Under the circumstances disclosed in this case it was the stockholders who acted and the directors were not fiduciaries. Under such circumstances equity will look through the fiction of the corporate entity to the natural persons beyond and will give or refuse relief according to the just rights of such persons 48

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In the Supreme Court of the United States

OCTOBER TERM, 1917.

No. ———

THE CLEVELAND-CLIFFS IRON COMPANY and WILLIAM G. MATHER,

vs.

THE ARCTIC IRON COMPANY,

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF ON BEHALF OF CLEVELAND CLIFFS IRON COMPANY AND WILLIAM G. MATHER.

This case comes here on certificate from the Circuit Court of Appeals of the Sixth Circuit asking instructions of the court upon certain questions of law.

The Arctic Iron Company was incorporated for the purpose of holding title to an undivided half of a certain tract of mineral land owned by two people (Rec., p. 1).

There were but two stock interests and all the stockholders were directors. Mr. and Mrs. Breitung owned one-half of the stock and Mr. and Mrs. Healy owned the other half of the stock. These four were directors. These directors exercised no power of control. The business of the Company was restricted by its charter to

that one tract of land. No business was done except to lease on royalty certain parts of the land. The stockholders made the leases. The directors and officers were used only to formally register the agreements made from time to time by the two stockholding interests. (Rec., p. 1.) The income from royalties was divided equally by Healy without action of the board of directors. There were no salaries and no expenses.

> "It was the specific intent of Breitung and Healy in providing for four directors to effect a perfect balance of power between the two interests." (Rec., p. 2.)

After the Cliffs bought the Healy stock the arrangement as it theretofore existed was continued and Mather and Hayden were selected as the two directors to represent the Cliffs' interests in recognition and execution of this plan (Finding No. 7).

ESTOPPEL.

The course taken by the parties was by understanding and agreement of all the stockholders of the Arctic Company. All parties, including the Arctic, are estopped from now asserting the invalidity of the transaction.

In the winter of 1898-9 each stockholding interest held separate and independent interests in the property in which the Arctic Company owned an undivided half interest. Kaufman and Breitung owned an undivided half of the fee of that property in addition to their one-half of the stock. The Cliffs Company had contract rights of great value in the four leases then resting upon the property and had the absolute control of said leases

in addition to its one-half of the stock. Corrigan, the owner of the existing leases, desired to sell them and to make a new lease on the property and approached both the Cliffs and the Oliver as prospective purchasers and new lessees. These independent property interests and rights owned by each side and the equal stock ownership precluded the making of any new lease covering the property. (Rec., pp. 2, 3 and 4.) Kaufman and Breitung were hostile to Mather and refused without reason or excuse to make a new lease to the Cliffs, but wanted to lease to Oliver. (Rec., pp. 4, 5 and 8, Finding No. 8.)

Under these conditions in the winter of 1898-9 Kaufman and Breitung (ignoring the Cliffs) separately and independently negotiated and agreed with the Oliver that if it would buy some of their private property at twice its value (Finding No. 14) they would make a new lease on the property at 15 cents per ton royalty, the minimum and other terms of the lease to be definitely settled thereafter. (Finding No. 8.)

The Cliffs learned of this arrangement, but at first did not know that it was coupled with a proposition to sell some of their private land. The Cliffs did not wish the property to be leased to the Oliver Company, which was its strongest business competitor. It, therefore, declined to give up its independent rights or consent to the lease, but offered to take a lease from Kaufman and Breitung upon *better* terms than *any* which might be given by the Oliver Company. (Rec., p. 4.) Kaufman and Breitung thereupon (in total disregard of the interests of the Arctic corporation) replied that they considered themselves already bound to the Oliver Company and refused to make such better lease. *Furthermore, they threatened that unless the Cliffs Company sur-*

rendered its independent rights and consented to the new lease which they wished to make, that they would begin litigation. (Rec., p. 4.) Kaufman and Breitung had proceeded separately and independently in negotiating with the Oliver Company without regard to the interests of the Cliffs Company or the Arctic Company and they treated their own interests as amounting to a three-quarters interest in the property.

Thereupon, by procurement of Corrigan, the Oliver Company began negotiations with the Cliffs for the purpose of obtaining a cancellation of its independent rights and removing its separate objections to the making of the new lease to the Oliver Company. (Rec., p. 5.)

In the course of such negotiations the Cliffs Company learned that Kaufman and Breitung, as a condition to their consent to such new lease, had required the Oliver Company to agree to purchase an interest in the fee belonging to them, which amounted to a clear bonus to Kaufman and Breitung of at least $65,000.00. (Rec., p. 7.) *The Cliffs was thus definitely advised that Kaufman and Breitung were proceeding independently and for separate considerations to themselves to deal with the property in question.*

Without setting forth the details it is sufficient to say that as the result of the Oliver Company's negotiation with the Cliffs, the Cliffs and the Oliver made a separate agreement—thus indicating *their intention to* likewise proceed separately respecting the property and rights held by the Cliffs—by which the Cliffs consented to the making of the new lease. (Rec., p. 6.) It is sufficient here that Kaufman and Breitung were directly or indirectly informed and understood that this *separate* agreement had been reached, and further that by one of

its express terms it had been agreed that the Cliffs Company would take no further part in the transaction; that Kaufman and Breitung were at liberty to go ahead on behalf of themselves and the Arctic and negotiate the best terms they could get from the Oliver; and that when terms had been agreed upon satisfactory to Kaufman and Breitung and the Oliver, the Cliffs Company would cancel its rights and would consent that the Arctic Company, by formal action, should acquiesce in the arrangement so made. (Finding No. 10.) Thereupon, upon this basis and understanding Kaufman and Breitung for themselves and the Arctic and the Oliver Company proceeded to negotiate and to agree upon all the terms and the details of the new lease. Neither the Cliffs nor Mather had any part in the transaction.

Each side was skilled and experienced in all matters pertaining to iron ore and neither influenced the other with respect to the new lease. (Finding No. 16.)

It is clear that each side treated the title held by the Arctic just as if it was owned one-half by each, and each side in respect to the new lease was inspired by motives of independent interest or feeling aside from the interests of the Arctic and negotiated with the Oliver in respect to the transaction untrammeled by any nominal directorship relation. Kaufman and Breitung never made any inquiry in respect to the terms of the contract which the Cliffs and the Oliver had entered into.

When the lease so agreed upon had been reduced to form it was acquiesced in by the formal corporate action of the Arctic Company as agreed upon in advance. The lease was approved at a stockholders' meeting and was then taken up and approved at a directors' meeting. (Rec., p. 6.)

The Cliffs Company's position in the negotiations with the Oliver was that the Cliffs in substantial effect owned one-fourth of the ore in the ground and Kaufman and Breitung three-fourths, and that the arrangement the Cliffs proposed enabled the Kaufman and Breitung interests to make a lease on their three-fourths interests in the property. (Finding No. 9.) If the Oliver and Kaufman and Breitung could agree upon the terms of the lease, then the Cliffs was ready to consent to the cancellation of the existing leases which it controlled and consent to such new lease. (Finding No. 10.)

The important fact which we wish to press here upon the attention of the court is that by the clear agreement and understanding of the parties each side went forward separately and independently representing its own interest without consultation or reliance upon the other, with the clear understanding in advance that the Arctic Company, as a corporation, would be wholly disregarded, except that it would be used as an instrumentality by these two interests for the purpose of formal execution of a lease already agreed upon and fixed as above indicated. The corporation was to be used only as a "rubber stamp" to formalize the actions of the real parties in interest, just as it always had been.

The parties acted and parted with their independent rights under this understanding. Upon the execution of the lease Kaufman and Breitung received their bonus of $65,000.00, and the Cliffs Company carried out the terms of its agreement with the Oliver. It accepted payment of a debt not due, consented to a novation of the traffic contracts and surrendered the control of the existing leases in order that they might be canceled and the new lease thus become effective.

That Kaufman and Breitung understood the parties were proceeding in disregard of the corporation is self-evident: On no other theory could their conduct and acceptance of this bonus be defended. They also knew that the Cliffs Company had contracted separately for itself with the Oliver Company, both for the surrender of the independent rights of the Cliffs and the consent to let Kaufman and Breitung make the lease. That the Cliffs Company and Mr. Mather understood the same thing and in good faith acted upon it is also beyond question. The court below found that both Mather and the Cliffs acted throughout this transaction in perfect good faith. (Rec., p. 8.)

The acts and conduct of Kaufman and Breitung and the Cliffs Company must be held in equity to amount to an agreement between them, that in the leasing of the property in question they would disregard the Arctic Company as a corporate entity and would proceed separately and independently and that each side might deal for itself with the Oliver with respect to its interests as if there was no corporation.

Breslin vs. Fries-Breslin Co., 70 N. J. L. 274, 281-284.

Beardsley vs. Beardsley, 138 U. S. 266, 270.

Under the above arrangement and understanding the Cliffs Company, in good faith, changed its position, parted with its individual property and rights and permitted the mines in question to be leased to the Oliver Company. This suit was brought and is prosecuted by Kaufman and Breitung individually, they wrongfully making use of the name of the Arctic Iron Company as complainant. The plaintiff stockholders representing just one-half interest in the Arctic Company and the defendant stockholders the other half interest (there being

no creditors), recovery herein will be solely for their benefit. On the plainest principles of justice it would be a fraud and a wrong upon the Cliffs Company, to permit Kaufman and Breitung to repudiate the understanding under which all the stockholders acted and now assert the invalidity of the Cliffs' contract on the ground that such contract involved a violation of directorship duty to the Arctic Company.

It is no answer to this proposition to say that the agreements of Kaufman and Breitung (or their acts and conduct which amount as we contend to an agreement) as stockholders, and that the Cliffs' conduct in recognizing and acting upon such understanding and agreement should not bind the *Arctic Company*, nor estop *it* to complain of the transaction. The authorities above as well as those which we will hereafter cite settle the proposition that in equity a corporation is but the aggregate of the natural persons who compose it; that whenever those persons have agreed to a situation or have so conducted themselves that they are estopped from disputing the results of their acts, that the corporation itself is estopped from asserting the right for their sole benefit.

We desire at the outset to press upon the attention of this court always to be borne in mind in the examination of this case, that the Circuit Court of Appeals in the most emphatic way found that Mather's conduct and that of the Cliffs was absolutely honest in fact; that all they did was done in good faith; that Kaufman and Breitung and the Arctic were not defrauded or wronged or damaged in any respect whatsover; that if recovery is had herein it must depend upon constructive fraud alone—as distinguished from actual fraud—arising "wholly as a matter of law and as a presumption of law from the relations of the parties."

With this preliminary statement of the general equities we will now proceed to discuss separately the several questions of law submitted by the Court of Appeals.

We understand from the last paragraph of the certificate (Rec., p. 10), that if any one of the questions, Numbers 1, 2, 3 and 6 is answered adversely to the Arctic Company, it will enable the lower court to dispose of the case. But in the event this court should conclude for any reason that these questions are not proper to be answered, the lower court desires instructions upon questions Numbers 4 and 5.

Each question must be answered in the light of the facts set forth.

Stratton's Independence vs. Howbert, 231 U. S. 399, 418, 422.

QUESTION No. 1a.

The Cliffs sustained no fiduciary relation to the Arctic corporation or to Kaufman and Breitung. It could be affected only in the event it was the beneficiary of the wrongful acts of someone in such fiduciary relation, and received property impressed with a trust in favor of the Arctic Co.

The Cliffs Company was a stockholder only in the Arctic Company. Stockholders sustain no fiduciary relation to each other or to the corporation.

United States Steel Co. vs. Hodge, 64 N. J. Eq. 807, 813;

Windmueller vs. Distilling Co., 114 Fed. 491-495; Aff'd. 115 Fed. 748; 26 Am. & Eng. Ency. of Law, 900;

Gamble vs. Water Co., 123 N. Y. 91;

Rothchild vs. Railway Co., 113 Fed. 476;
Trust Co. vs. Bridges, 57 Fed. 753, 763, 767;
Oil Co. vs. Marbury, 91 U. S. 587;
Cook on Corporations, Sec. 662;
Colgate vs. U. S. Leather Co., 67 Atl. 657, 663-4;
Shaw vs. Davis, 78 Md. 308, 318-319.

A stockholder may even demand and accept a separate consideration for his consent to the alienation of the corporate property, owing no duty to disclose his private arrangements.

Bird Coal Co. vs. Humes, 157 Pa. St. 278;
Lamkin vs. Palmer, 24 N. Y. App. Div. 255;
Bartow vs. Sidway, 25 N. Y. Supp. 179, Secs. 182, 183;
Windmueller vs. Distilling Co., 114 Fed. 491.

The authorities are somewhat in conflict as to the status of a majority stockholder.

Some authorities deny that such stockholder sustains any fiduciary relation to the minority stockholders, while others hold that a *quasi trust* relation may arise under certain circumstances.

Rothchild vs. Memphis R. R. Co., 113 Fed. 476;
Windmueller vs. Standard Distilling Co., 114 Fed. 491;
Beardsley vs. Beardsley, 138 U. S. 262, 267-8;
Colgate vs. U. S. Leather Co., 67 Atl. 657, 663-664;
Mumford vs. Development Co., 111 Fed. 639;
Rogers vs. Nashville etc. R. R. & Nav. Co., 91 Fed. 299;
Erwin vs. Oregon R. R. etc., 20 Fed. 577;
U. S. Steel Co. vs. Hodge, 64 N. J. Eq. 807.

The authorities sustaining the *quasi trust* relation concede that it arises only when the majority stockholder in fact controls the corporation and fraudulently dominates the Board of Directors or officers of the corporation to the injury of the minority stockholders. There must be actual fraud.

The Cliffs Company was not in this situation. There were four directors. While the Cliffs Company could probably control the votes of two of these, the two were powerless to act. They were not in control of the Board in the sense in which that term is used in the above authorities. There was no actual fraud. The lease was not procured by them. It was negotiated and its terms fixed by Kaufman and Breitung without influence from Mather and was a good lease. (Rec., findings No. 12 and No. 16.) The Cliffs does not, therefore, come within those cases involving rights and duties of majority stockholders.

After the lease was agreed upon it was submitted to the stockholders. The Cliffs stock was voted affirmatively at the stockholders' meeting. This was proper (see above authorities).

Owing no legal duty itself either to the Arctic Company or to the other stockholders therein, the Cliffs would be affected only in the event it received property acquired for it by Mather as agent of the Arctic in the course of its business, and which equitably belonged to it, but which was wrongfully turned over to the Cliffs Company.

In this case, to the knowledge and with the consent of all parties concerned, Mr. Mather was not acting for the Arctic Company in dealing with the Oliver Company in the transactions here in question, but was acting for the Cliffs Company as its agent in dealing with its independent rights and property in which the Arctic had no interest or right,—property which the Arctic Company itself could not control or deal with, and which Mather had no right to deal with for its benefit. The considerations received from the Oliver Company therefor, were

not the results of the conduct of the business of the Arctic, but were the results of the conduct of the business of the Cliffs, which neither Mather nor the Arctic Company had the right to divert from the Cliffs Company.

The profits made by the Cliffs on its interest in the new lease has a tendency to obscure the real situation. The "interest" in the new lease was important, but only one of many important things included in the contract between the Oliver and the Cliffs. This suit was not brought to recover the "interest" in the lease, but the "contract" between the Oliver and the Cliffs, on the theory that *that contract itself* was acquired by the Cliffs under such circumstances that it was held in trust for the Arctic. The decree awarded the Arctic the proceeds, or the things into which the contract was converted—the Breitung fee, the Regent stock—specifically in kind, and as a mere incident to the recovery of the specific property, an account was taken of the profits realized by the Cliffs from the possession of the property, which profits were likewise awarded to the plaintiff.

Question 1-a therefore (as well as several other questions) while in *form* limited to the right to recover "profits under the lease" must be considered broadly as including the right to recover the contract itself. This thought must always be borne in mind. *Plaintiff is entitled to relief only in the event the contract between the Oliver and the Cliffs was held in trust for the Arctic.*

The Cliffs Company did not secure that contract with the Oliver as the consideration of or as the result of the wrongful act of anybody who was in a fiduciary relation. Let us briefly examine the facts found.

The Cliffs Company in the negotiation of the contract with the Oliver acted through Mather, its President and Treasurer.

Kaufman and Breitung knew Mather was president of the Cliffs and was representing it in that negotiation. They knew of the Cliffs' property rights in the old leases resting upon this property, and that those rights had to be bought out and canceled before any new lease could be made, and they knew that through Mather's negotiation with Oliver that had been arranged. (Rec., findings No. 5, 8, 9, 10, 15.) The employment of Mather, therefore, by the Cliffs to act for it in that negotiation was entirely proper and may not be complained of.

The lease (after its approval by the stockholders), was submitted to the Board of Directors and was approved by the unanimous vote of the three directors present, Kaufman, Breitung and Hayden (Mather being not present). (Rec., finding No. 12.)

Mather's absence from the Directors' Meeting might be criticised if there were any stockholders who could complain of or who were injured by such absence; but there were none. Kaufman and Breitung who had negotiated this lease and knew all about it and as stockholders had approved it comprised all the stockholders besides the Cliffs. They were present in person at the Directors' Meeting representing themselves. They cannot complain of Mather's absence.

Tyler vs. Hamilton, 62 Fed. 187, 189;
McCracken vs. Robison, 57 Fed. 375;
Sargent vs. Palace Cafe Co., 167 Pac. Rep. 146;
Gillett vs. Bowen, 23 Fed. 625;
Harbor vs. Manning, 64 Texas 558;
Old Dominion Copper Co. vs. Lewisohn, 210 U. S. 206;
Foster vs. Seymour, 23 Fed. 65, 66.

Mather as Secretary of the Aretic attested the signing of that lease. (Rec., last part finding No. 12.) The lease having been carefully considered and approved by

the unanimous action of the stockholders and the unanimous action of the three directors present, the execution thereof was formal, involving no official judgment or discretion. Mere attestation of an instrument by a secretary is never anything but a ministerial act.

Machen Modern Law of Corporations, Secs. 1670 etc.; Secs. 487-490.

It will probably be argued that Mather's absence from the Directors' Meeting and his attestation as Secretary of the lease were effective in consummating the approval of the lease, and therefore were within the contemplation of the Oliver and Cliffs when they made their contract. If this be granted it will not change the legal situation. The arrangements with Oliver did not contemplate any *wrongful* act on Mather's part. At most it allowed Kaufman and Breitung to lease their three-fourths interest on their own terms. Mere failure to act is negative and not wrong, unless there exists the *affirmative duty* to act, and we have shown that the circumstances were such in the case at bar that no affirmative duty rested on Mather as a director to appear and represent Kaufman and Breitung. It can not be contended therefore that the Cliffs received the Oliver contract as the consideration of a wrongful act by Mather.

There was no wrongful act. There was no injury to the Arctic Company. This statement is emphasized by the finding that Mather's conduct throughout was honest and by finding No. 17 to the effect that the Arctic corporation suffered no prejudice, but rather a benefit, because of the Cliffs' interest in the lease; that Mather *could not* have secured this interest in the lease for the Arctic; that Oliver could not have transferred such interest to the Arctic and Kaufman and Breitung *would*

not have permitted the Arctic to take it had it been offered to the Arctic. The most that the Arctic could have done had it then known all the facts would have been to refuse to complete the new lease to the Oliver Company. This relief it could have obtained by rescission in 1904 on discovery of the facts. Its election to keep the lease after it knew all the facts ratified any wrong done to it when the lease was executed.

The only wrong suggested in the record is a constructive one—a failure on Mather's part to disclose to Kaufman and Breitung that the Cliffs' contract with Oliver provided for an acquisition by the Cliffs of a one-fourth interest in the new lease. The fact that this failure to disclose was intentional (Finding No. 11) adds no force to the fact itself. We have the express finding that

> "there was no fraud or misleading or breach of directorship duty by Mather." (Rec. p. 10.)

The concealment had no relation to the real interests of the Arctic Company or its business, and was not intended to harm Kaufman and Breitung or the Arctic. It was occasioned by the open hostility of Kaufman and Breitung to Mather, and Mather's fear of litigation threatened. (Page 4, finding 8.)

If we concede that Mather's failure to make this disclosure was a violation of duty there still could be no recovery. If the Cliffs had secured the contract from Oliver as a mere bonus—a gratuity—or if that contract was in fact a consideration for Mather's act as a director and officer in approving the lease, we could quite understand and appreciate a claim that failure on Mather's part to make the disclosure mentioned would be such a violation of duty as might warrant a recovery. Such a suggestion is, however, wide of the fact. The Cliffs had

valuable interests in the existing leases, to protect which the control itself of these leases had been vested in the Cliffs. The cancellation and surrender of those interests and rights were demanded and required by the Oliver as a prerequisite to the making of any new lease whatever upon the property, and they constituted the consideration which the Cliffs paid for the Oliver contract. The Oliver contract, therefore, was the property of the Cliffs. A failure to make disclosure even if a violation of duty might justify rescission, but it would not convert into trust property a contract which in fact was not of that character.

The Cliffs Company not being in a fiduciary relation itself and having made no improper use of Mather as a director or officer of the Arctic and not being the beneficiary of any wrongful act, was not, therefore, affected in its rights by any fiduciary relation which may be claimed in law to have technically rested upon Mather by reason of his being an officer and director in the Arctic Company.

Question 1a should, therefore, be answered, No.

QUESTION No. 1b.

Rescission the only remedy.

We will discuss this question on the theory that the Cliffs Company is affected by Mather's relation to the Arctic, and that Mather's act in signing the lease without disclosing the bargain which his Company had with the Oliver for an interest therein was a violation of duty.

A party induced to enter into a contract through fraud has certain well recognized remedies:

(1) He may sue for damages for the fraud.

(2) Acting seasonably he may rescind.

(3) If anyone in a fiduciary relation to him has profited in the transaction by an improper use of his relation he may affirm the contract and require such party to account to him for the profits made by such fiduciary.

(4) If a stronger with notice becomes the beneficiary of the wrongful act of the fiduciary he has generally the same remedies as under No. 3.

The Cliffs Company was largely interested in the four leases then resting on this same property which had many years to run. (Findings 4 & 5.) The lessees under these old leases had obligated themselves to give

> "to the Cliffs railroad the carriage of all ore produced by the Queen mines at a stated price per ton and until an agreed total had been carried, including all ore produced by other properties which the Queen might thereafter control, and also the carriage of all its traffic of coal and other supplies in the reverse direction."

The Cliffs had also loaned to the Queen $250,000 due serially, $50,000 each year on April 2, 1898, 1899, 1900, 1901 and 1902. *These existing leases were, as security for the debt and traffic contract, placed absolutely in the control of the Cliffs Company.* This arrangement was made nearly two years before the Cliffs Company became interested in the Arctic and all facts in relation thereto were known to Kaufman and Breitung. These leases had to be cancelled before the new lease could be made.

The making of a new lease to the Oliver Company, which Kaufman and Breitung desired, the court below

found involved the purchase of Corrigan's rights in the existing leases

> "controlled by the Cliffs and the elimination of these leases; it required the consent of the Cliffs to the cancellation of the traffic contract between the Queen and the Cliffs, or the acceptance by the Cliffs of another party in substitution for the Queen in this contract; and it required the consent of the Cliffs to accept payment of the debt due it from the Queen but which was not due for an average of two years. The old leases could not be surrendered by the Queen, without the Cliffs' consent, and they could not be cancelled by the lessors, if the Cliffs, as assignee of the lessees, was willing to make good whatever default by the lessees might exist." (Rec., p. 4, finding No. 8).

At the instigation of Corrigan (who was to receive a large sum for his existing leases) "the Cliffs and Oliver took up negotiations between themselves" which resulted in the agreement set forth in the findings of the Circuit Court of Appeals (Finding Nos. 9, 10, 13).

Breitung and Kaufman, who were men of great experience in business, thoroughly competent and familiar with mining business (Rec. No. 16) were informed of the arrangement (Finding No. 10). With this knowledge they proceeded to negotiate the lease in question without advice or assistance or recommendation from Mather or the Cliffs Company, and when it was agreed upon and executed, the Cliffs Company carried out its contract with the Oliver Company. It accepted payment of the debt not yet due and arranged for the novation of the traffic contract and surrendered control of the leases then existing upon the property in order that they might be cancelled. (Finding No. 10, 13, 18.)

(a) That this act of the Cliffs Company in consenting to accept this money before it was due constituted a

proper consideration for any contract the Cliffs Company received from the Oliver cannot be denied.

In 22 *Am. & Eng. Cyclo. of Law*, 530, the author says:

> "A debtor has no right to compel a creditor to receive payment of an indebtedness in advance of its maturity even though he tenders the principal together with all interest which would accrue up to the time of maturity."

In *Abbe vs. Woodwin*, 7 Conn., 377, 388, the Court said:

> "What is the object of this bill? It is to compel the defendant to accept his money before it is due and relinquish his security. In other words, it is to substitute another contract for that which the parties have entered into. It will be in vain to search for authorities to that effect. None are shown. It is opposed to the whole doctrine of contracts."

In *Railroad Co. vs. Union Trust Co.*, 156 N. Y. 592, where there was an attempt made to compel bondholders to accept their money before it was due, the Court said:

> "The outstanding bondholders have a right to receive their d[illegible]ly as provided by the contract. That right is as sacred as to receive it at all. The obligation of the debtor is to pay the principal when it becomes due, and he has no right to compel the creditor to accept payment until it becomes due."

(b) Nobody will deny that the surrender of the traffic contract of the Queen Company *controlled* by the Cliffs and the acceptance of the party to perform the same another company in the *control* of its *principal competitor in business*, was a sufficient consideration to support any contract made by it in good faith.

(c) That privileges and rights (such as the control over the existing lease possessed by the Cliffs Company [finding No. 5] whereby it could enforce specific per-

formance of the traffic contract) are property as sacred as any other form of property is equally well settled, and when this control was bargained away the Cliffs Company had the right to place a price thereon.

9 Cyc. 335:

> "The waiver of a right or forbearance to exercise the same is a sufficient consideration for a promise made on account of it. The right may be legal or equitable, certain or doubtful, provided it be not utterly groundless; and it may exist against the promisor or against a third party."

Elliott on Contracts, Sec. 233:

> "The abandonment of any legal right may be sufficient consideration to support a promise. Nor is it necessary that a property right be directly or indirectly involved. The abandonment of any legal right, though it may not or cannot result in any financial gain or loss to either party, may be a valuable consideration."
>
> "There is sufficient consideration for a contract if the promisee in return for the promise does any thing legal which he is not bound to do, or refrains from doing anything which he has a right to do."

Street vs. Galt, 121 N. Y. Sup. 514, 516; 136 N. Y. App. Div. 724.

> " 'Consideration' means, not so much that one party is profiting, as that the other abandons some legal right in the present or limits his legal freedom of action in the future as an inducement for the promise of the first."

Hamer vs. Sidway, 124 N. Y. 538, 545; 21 Am. St. 693.

The Cliffs Company, therefore, had the undoubted legal right when the Oliver Company, through Corrigan's suggestion, asked it to change its position with respect to these properties,—take payment of a debt before maturity, agree to a novation of the traffic contract

and surrender the control of the existing leases, to take into account and consider *all the advantages and disadvantages to it of complying with such request, and to stipulate a price and the conditions under which it would consent.*

It was for these property interests and rights above enumerated and described, all owned by the Cliffs Company, that it contracted in respect to with the Oliver Company; all of which as found by the court was done in absolute good faith.

In addition to the rights and property interest which the Cliffs Company surrendered, it assumed in connection therewith by its contract further important obligations. It agreed to buy and pay for the Breitung fractional fee interest "it did not want;" it agreed to furnish one-fourth of the capital necessary to buy out Corrigan's rights in the existing leases; it obligated itself to advance one-fourth of the capital necessary to carry on future mining operations; (Find. 13; 18) it assumed the risks and hazards of this new mining venture;—risks which Kaufman and Breitung had fully considered and declined to assume and undertake, both for themselves and for the Arctic; (Find. No. 17) risks which in the light of well known business experience are serious.

An action for accounting even against a fiduciary lies only when the fiduciary has wrongfully received something which is the *result of his acts* in *that* relation.

Mechem on Agency, Vol. 1 (2nd Ed.) treats of this subject at great length in Chapter 2. In Section 1224 he says:

> "*Profits made in the course of the agency belong to the principal.* The well settled and salutary principle that a person who undertakes to act for another shall not, in the same matter, act for him-

> self results also in the other rule that all profits made and advantage gained by the agent in the execution of the agency belong to the principal, and it matters not whether such profit or advantage be the result of the performance or of the violation of the duty of the agent if it be the fruit of the agency."

He further says:

> "Sec. 1228. *Profits must be fruits of the Agency.* But in order to entitle the principal to the profits they must, as stated, be the fruits of the agency. Of transactions outside of the scope of the agency and not done as agent, the principal cannot demand the profits nor charge the agent as a trustee."

The Cliffs Company (not being in a fiduciary relation itself) can certainly be in no worse position than if it was itself the fiduciary.

Let us assume in discussing Question 1-b that Mather was in a fiduciary relation and that the Cliffs Company was in law under the facts of this case in the same relation to the Arctic Company or to the Kaufman and Breitung interests, as Mather, and let us assume further that it became the duty of the Cliffs Company when Mather signed the lease to disclose to Kaufman and Breitung that the contract with the Oliver Company secured to the Cliffs an "interest in the lease" and let us assume further that this duty was violated, there still would be no right to recover that "contract" and the proceeds thereof because that contract *came to the Cliffs not as a bonus or gratuity nor as a consideration for a violation of duty, but in payment for property rights and interests belonging to it, which it did not hold in trust and was under no legal duty to use for the benefit of the Arctic Company.*

It is not the *violation of duty* standing alone that gives relief in a case like the one at bar. The Cliffs must have received something in the nature of a bonus or gratuity which was the "fruits" of the violation of Mather's agency relation to the Arctic or which was the consideration paid for said violation before it can be called to account.

Our case (if we regard the Cliffs Company through Mather's official relation to the Arctic as responsible in the same way as if it were in a fiduciary relation to the Arctic) belongs to that type of cases sometimes found in the books where the fiduciary *disposes of his own* property in the same transaction where the property of the *cestui* is also disposed of.

The most common type involving principles applicable to our situation are cases where a person employed as agent to *buy* property for a corporation buys property from *himself* without disclosing his ownership. The purchase for the corporation may be at a price much in excess of the market value of the property, and much in excess of the price at which the agent originally purchased the property. While all these cases concede that the principal may rescind regardless of actual damages, because of the failure to disclose the adverse interest, they all hold he may not affirm the contract keep the property and claim an accounting of the profit the agent made in the transaction, *unless the agent acquired the property at a time when it was his duty to get it for his principal.*

Sunderland vs. Kilbourn, 3 Mackay 506; Aff'd. 130 U. S. 505;

Ladywell Mining Co. vs. Brooks, 35 L. R. Chan. Div. 400;

In re Cape Breton Co., L. R. 26, Chan. Div. 221; Same case on Appeal, L. R., 29 Chan. Div. 795;

Burland vs. Earl, A. C. (1902) 83;
Bristol vs. Scranton, 57 Fed. 70; Aff'd. 63 Fed. 218;
Railway vs. Magnay, 25 Beav. 586;
Ely vs. Hanford, 65 Ill. 267;
Whitehead vs. Lynn, 20 Col. App. 51.

See also:

Barstow vs. Sidway, 25 N. Y. Supp. 179;
Hitchcock vs. Barrett, 50 Fed. 653;
Barr vs. Pgh. Plate Glass Co., 51 Fed. 33; Affirmed 57 Fed. 86;
Wyman vs. Bowman, 127 Fed. 257, 272-274;
Cummings vs. Synnott, 120 Fed. 84;
Re Imperial Land Co., L. R. 10 Eq. Cas. (1870) 298.

The Cliffs Company acquired the traffic contracts and made the loan to the Queen Company and secured control of the Queen leases April 2, 1897, while the transaction in question (the making of the new lease) took place in the spring of 1899. These property rights and interests so disposed of were consequently the property of the Cliffs and not the property of the Arctic and were not held in trust for it, and of necessity any consideration paid therefor by the Oliver was likewise the property of the Cliffs.

The difference between property owned by an agent or fiduciary acquired prior to the existence of the relation and property acquired by the agent or fiduciary after the relation commenced is well illustrated in *Sunderland vs. Kilbourn*, first cited above.

In this case in 3 Mackay, 506, the third paragraph of the syllabus reads:

> "3. K. and L., a firm of real estate agents, were employed by S and H to make a purchase of real estate. Under the contract if the property was accepted at the price submitted, K and L were to be

paid a commission on the purchase price. At the time of and somewhat before entering into the contract, K and L held the refusal of this piece of property at $40,000. After the contract was entered into, K and L took the money deposited with them by S and H and purchased it for themselves and then, without making known to S and H that they were really the owners of the property, submitted it to them at $65,000. The latter accepted it at that price, and the conveyance was accordingly made. S and H subsequently discovered the real facts and claimed the benefit of the purchase at $40,000. But it was held that K and L were under no obligations to give S and H the benefit of a contract entered into before their contract with them; that the remedy of the latter was to repudiate their contract if an imposition had been practiced by a concealment of the facts; but they could not retain the property and recover the $25,000 in addition * * *.

"5. But where K and L, acting under the contract purchased a piece of property at 40c a foot and turned it over to S and H at 50c, at which price the latter agreed to take it, it was held that K and L were accountable to them for the difference."

This case was taken to the Supreme Court and is reported in 130 U. S. 505 (516-517). The tract of land covered by the third paragraph of the syllabus above is referred to, on page 517, as "Square No. 15," and the tract of land referred to in the fifth paragraph of the syllabus above is referred to as "Lot No. 17," on page 516. The decision of the lower court in respect to these two matters was affirmed. In reference to the tract covered by paragraph of the syllabus number 3 above, Chief Justice Fuller said:

"* * * Kilbourne and Latta before their connection with complainants had made an offer for the square which was accepted. * * * (Their) bargain for the lot was $40,000, but there was no agreement

> * * * that the complainant should have the benefit of all the defendants' outstanding contracts, and as they were contented with their purchase it is difficult to see upon what ground they can recover here. The relations between the parties was such that Kilbourne and Latta should have disclosed that they were acting as principals in this sale, but the complainants suffered no pecuniary loss for want of such disclosure since they took the property at their own price. *Their remedy if they were deceived lay in throwing up the bargain,* but they did not do so and cannot treat it as was well said (3 Mackay 525) 'as a contract fulfilled and as a contract broken.'" (Italics mine.)

The distinction between the situation where Kilbourne and Latte obtained contract rights in property before their agency began, and where they obtained such rights after the agency began, is fully recognized by Chief Justice Fuller in the difference between "Square No. 115" on page 517, and "Lot No. 17" on page 516.

In *Burland vs. Earl, supra* (Law Reports, Appeal Cases, 1902, p. 83), the syllabus reads as follows:

> "Where a director purchased property without mandate from the company, and under such circumstances as did not make him a trustee thereof for the company, and thereafter resold the same to the company at a profit—
>
> "Held, that whether or not the company was entitled to a rescission of the contract of resale, it was not entitled to affirm it and at the same time treat the director as trustee of the profits made."

In the opinion in this case (p. 98) Lord Davey said:

> "In these circumstances, Burland has been ordered to pay to the company the sum of $38,436, being the amount of the profit realized by him on the resale. Both courts have held that the resale was by Burland's advice and influence, and was made without disclosing to the company the price at which

he had purchased." * * * (Here follows a discussion of the evidence.) "But their Lordships do not think it necessary to pursue these topics because they are of opinion that the relief prayed by the amended statement of claim and granted in the courts below is altogether misconceived. There is no evidence whatever of any commission or mandate to Burland to purchase on behalf of the company, or that he was in any sense a trustee for the company of the purchased property. It may be that he had an intention in his own mind to resell it to the company, but it was an intention which he was at liberty to carry out or abandon at his own will. * * * The sole question is whether he was under any legal obligation to do so. Let it be assumed that the company, or the dissentient shareholders might by appropriate proceeding have at one time obtained a decree for rescission of the contract. But that is not the relief which they ask or could in the circumstances obtain in this suit."

Lord Davey then discusses several cases, and then says:

"To rescind the sale is one thing, but to force on the vendor a contract to sell it at another price is a totally different thing."

Railway Co. vs. Magnay, 25 Beavans' Reports, 586, is a similar case. Here a railroad company furnished a director a large sum of money to enable him to buy a concession of another line. He purchased it, and it turned out that he purchased it from himself, he being the concealed owner of it. It was held that the Company must either adopt the transaction or repudiate it.

Perhaps, the fullest discussion of this proposition is found in *In re Cape Breton Company,* Law Report 26, Chanc. Div. 221, where the syllabus reads:

"If an agent employed by a principal to purchase property for him sells to the principal prop-

erty of his own which he acquired before the agency existed, concealing from the principal the fact that it is his own property, the principal has a right, on discovering the real facts, to rescind the contract. But if he decline to rescind, or if by reason of intermediate dealings with the property rescission has become impossible, the principal is not entitled to call on the agent to account for the profit which he has made by the sale, i.e., either the difference between the price which he himself gave for the property, and the price which he obtained from the principal, or the difference between the latter price and the market value of the property at the time of the sale to the principal."

During the argument, Pearson, J., put the very pertinent question to counsel (p. 224):

> "If a man sells his own property to you, on what possible principle of law or equity can you make him account for the profit which he has made by the sale upon his previous purchase of the property, unless you can show that he was your agent at the time when he made the purchase? You may be able to rescind the contract if he was your agent at the time when the sale was made to you and he concealed the fact that the property was his own; but if you do not, or cannot rescind the contract, what right have you to keep the property and make him repay you the excess of the purchase money above the sum which he gave for the property?"

Further along in the opinion, Pearson, J., quoted from the opinion of Lord Justice Cotton, delivered in a similar case, where Justice Cotton, speaking of the order made by the Vice Warden below, said:

> " 'As I understand his order, * * * he has allowed each of the appellants in the two appeals such a sum as was paid by him on his acquisition of the shares in the mine in question, and then giving credit for that has charged him with the difference between that sum and what he considers as the value

of the shares. The principle of the order must be this, that the company are at liberty to treat these persons as trustees of the property for the company, and treating them as trustees to allow them only what they paid for the property, and if they got anything else out of the coffers of the company to make them account for that. Neither on principle nor on authority can that be maintained, unless at the time when the so-called vendor acquired the property he either acquired it for the company or was in such a position of fiduciary relation to the company that any purchase made by him of property available for the company must be considered as a purchase made by him as a trustee for the company. In that case what the court does is to go back to the original purchase made by the person who afterwards purports to sell to the company at an advanced price and to say this was already the company's at the price which you originally gave for it when you were a trustee for the company. * * * But here, as far as I understand the evidence * * * there is no ground for suggesting that at the time when Mr. Moss acquired his interest * * * he was acquiring it as a trustee for the company, * * * . The suggestion is that they bought * * * for the company; that they could not legally do this; and therefore the company, not seeking to set aside the transaction, may say: "We will take this at its fair value and make you account for the difference." How can that be done? I can quite understand an action to set aside the contract, but that is not the course adopted by the company. I can see no ground either on principle or authority on which the company can say, "not seeking to set aside the contract, we will hold you as passing this to the company, not because you originally acquired it for the company, but because you entered into a contract to sell to the company, which is not binding, and therefore we make another contract to take it from you for what it originally cost you, making you account for whatever else under that invalid contract you stipulated should

be paid for it." I am of opinion that this cannot be maintained.' "

This case was affirmed on appeal, *In Re Cape Breton Company,* L. R. 29, Chanc. Div. 795, and we respectfully refer the Court to the opinion of Fry, L. J., p. 811 and subsequent pages.

Bristol vs. Scranton, 57 Fed. 70 (affirmed by the Circuit Court of Appeals in 63 Fed. 218), was one brought on the theory that defendants had obtained a "bonus." The facts in relation to this case were briefly these:

In the course of negotiations for a consolidation between the L. Steel Co. and the S. Steel Co., of which latter company the defendants Scrantons were President and Vice President and conducted the negotiations on behalf of the S. Steel Co., a private contract was made between defendants and the L. Company in connection with and as a part of the consolidation contract whereby the L. Co. agreed to pay the Scrantons $350,000 for an agreement to keep out of the iron business for a period of ten years. The contract of consolidation was then completed. The action was by a stockholder of the S. Steel Co. to compel the defendants (who as officers of that company negotiated the consolidation) to account for what they thus received. The syllabus reads:

> "Held, that as the transaction *was honest in fact* and the plaintiffs had elected to retain the benefits of the consolidation which *was unattainable without the personal covenant of the defendants,* neither company S. nor the complaining stockholders had any equity to take from the defendants the price of the personal covenant by which they were bound." (Italics ours.)

At page 79, Judge Acheson, speaking for the Court, says:

> "In no proper sense were the bonds in controversy a profit made out of the agency or fiduciary relationship which existed. They were not a gratuity nor were they paid to the Scrantons because of their fiduciary position. They were paid and received upon a valuable consideration moving wholly from the Scrantons individually. * * *
>
> "* * * The bonds were not paid to the Scrantons to influence their action adversely to their principal. Neither was the Scranton Steel Co. injured by the individual contract. In very truth the Company was profited thereby, for without the personal covenant consolidation could not have been effected at all. * * *
>
> "If the plaintiffs were proceeding for the rescission of the consolidation agreement they might have tenable grounds; but the plaintiffs propose to hold on to the consolidation agreement. So electing, and actual fraud being eliminated from the case, can they take from the Scrantons the price of their personal covenant without which the consolidation was unattainable? Surely in a court of equity the question admits of but one answer."

Insurance Press vs. Montauk Wire Co. et al., 103 N. Y. App. Div. 472, is an interesting case illustrating this rule. The suit was by a stockholder of a corporation to enforce the liability of individual defendants to such corporation. Defendants G and H who were directors of the corporation had transferred to it certain patent rights alleged to be worth approximately $10,000, and had received in return the entire stock of the corporation, $3,000,000. They returned $750,000 of the stock to the Company, which thereupon sold the same to the plaintiff and others in order to raise working capital. The relief asked was a return for cancellation of the stock held by

the defendants in excess of the value of the patent rights given therefor. In discussing the relief to be granted upon the facts, and without reference to the right of the plaintiff to bring the action or to the West Virginia statute requiring payment of par value for the stock, Judge Ingram, page 475, said :

"Considering the relations that existed between this Company and the defendants, such gross overvaluation would undoubtedly give to the corporation a right to disaffirm that contract. It would also give to any stockholder if any were in existence before the stock was issued, a right to apply to a court of equity to prevent the consummation of such a transaction. * * *

"As before stated, the Company has power to rescind the transaction, and upon a tender of the transfer of the patents the individuals could be compelled to transfer their stock to the defendant corporation or to account to the corporation for the stock that they were unable to so transfer if there were fraud in the transaction; but this, neither the plaintiff as a stockholder, nor the corpration, proposes to do. They propose to hold on to the property that they acquired from the individual defendants, but to compel the defendants to return to the corporation a part of the consideration that the corporation had paid for the patents. The effect of this would be to compel the individual defendants to sell to the corporation the patents for a sum which the court should find the patents were worth at the time of the transfer.

"The individual defendants were the owners of these patents. They had the right to hold them unless they obtained the price at which they were willing to sell, and were not bound to sell them at a price to be fixed by the plaintiff, by the court, or by anybody else. Whether they knew that the value of the patents did or did not exceed $10,000 was entirely immaterial. They had a right to hold the letters pat-

ent until they were offered the price at which they were willing to sell. * * *

"I know of no principle which would justify a court of equity in compelling the owners of these patents to accept any consideration for their transfer to the corporation except that agreed on, and, upon the ground that the patents are not worth the sum agreed on as a consideration for the transfer, decree that the vendors must pay back to the corporation the consideration they had received less the real value. The Company cannot keep the bonds unless it is willing to pay what the owners of them were willing to sell them for." Citing *Burland vs. Earle,* and *Erlinger vs. New Sombrero Phosphate Co.,* 3 App. Cas., 1218.

In *Continental Securities Co. vs. Belmont et al.,* 144 N. Y. S. 801, where the defendants had received 1500 shares of stock in the Rapid Transit Company in consideration of certain rights transferred to the Company, the plaintiff, a stockholder, sought to make the defendants account therefor, alleging that the defendants controlled the Company and its directors, and had obtained said shares as a bonus through fraud or concealment, Van Sicklin, J., stated the test to be applied to such a situation as follows:

"The sole question to be decided is whether the properties turned over and the service rendered by August Belmont & Co. to the Inter-Borough Rapid Transit Company pursuant to agreement for which said firm received said 15,000 shares of the capital stock of said Company, were of so small a value or in substance so ridiculous that the transaction was unconscionable and a mere *subterfuge* or *pretense* to *cover* a *gift or bonus.*" (Italics ours.)

The Circuit Court of Appeals has found that Mather's conduct *was honest; that there was no misleading in any respect whatever.* The Cliffs Company acting in

good faith in its contract with Oliver parted with property rights of substantial value *without which the Oliver lease which plaintiff still holds and enjoys could never have been secured.* When, therefore, in 1904 all the facts were discovered the Arctic Company was put to its *election* to *stand by* the Oliver lease so secured or *rescind* it. It elected to hold on to the Oliver lease. To permit it to affirm that lease with its benefits and advantages and also claim the "contract" between the Cliffs and the Oliver, which was the consideration of the surrender of property rights of the Cliffs, is to permit the Arctic to appropriate the property of the Cliffs. There is no difference in principle between our case, where the Cliffs Company by contract parted with and disposed of its property to the Oliver for an agreed consideration and the cases above cited and quoted from, where the fiduciary sold his property to the principal direct for an agreed consideration.

The so-called "interest" in the new lease acquired by the Cliffs in its contract with the Oliver is largely responsible for the confusion in this case. This confusion will all disappear if it is borne in mind that the interest in the "lease" bears only on the question of violation of duty by Mather and this suit was brought to recover the "contract" itself in its entirety on the theory that that "contract" was in some way the property of the Arctic and held by the Cliffs in trust for it. The Cliffs Company's situation is not different from what it would be if the Oliver Company had paid to the Cliffs a sum of money in cash, say $50,000.00, in consideration of which the Cliffs Company accepted payment of the debt not yet due, consented to a novation of the traffic contract and to the surrender of the control of the existing leases.

There is another and slightly different view of the case, leading to the same conclusion.

While it is the general rule that a director may not make a contract with his corporation secretly for his own benefit, yet such contract is not absolutely void, but voidable only at the will of the corporation. When ratified with full knowledge it is binding upon both the corporation and the director.

Twin Lick Oil Co. vs. Marbury, 91 U. S. 587, 588-589.

The contract between the Cliffs and the Oliver was not to be consummated unless the Oliver and Kaufman and Breitung could agree on the new lease. The contract was inseparably connected in that sense with the new lease. It was, however, supported by a separate and independent valuable consideration moving from the Cliffs to the Oliver. The contract was, consequently, the property of the Cliffs and not in any sense the property of the Arctic. The provision in that contract giving to the Cliffs an interest in the lease would, if Mather were really in a fiduciary relation, justify the Arctic in avoiding the lease, but has the complainant any other remedy than avoidance, and when the plaintiff elected in 1904, after receiving full knowledge, to hold on to the lease and ratify it, is it not estopped from making any further claims?

If the Cliffs had received the Oliver "contract" as a pure bonus or gratuity affirmance of the lease with full knowledge would not bar plaintiff from the recovery of such bonus or gratuity, because in law *they were always the property of the plaintiff*. The same result might follow if the "contract" the Cliffs received from the Oliver was given *solely in consideration* of a violation of duty

by Mather. The "contract" in both cases might be said to be the "fruits" of an act of Mather in the relation of agent to the Arctic. The contract the Cliffs received was not, however, a bonus or gratuity, nor the consideration of a violation of duty by Mather. While, therefore, the Arctic might have avoided the lease upon discovery of the facts, yet when it elected to keep the lease knowing that it was unattainable except through the surrender of the property rights of the Cliffs, such election and adoption has in law the same effect as if the Arctic had *originally* made the lease *with notice of all the facts.*

There being in this case no actual fraud the effect of the formal election to keep the lease under the circumstances of this case barred the plaintiff of all right to complain of the manner in which that lease was secured.

We have in our preliminary statement and again shall later in discussing Questions Numbers 4 and 5 set forth the reasons why there was in our opinion no fiduciary relation whatever between the parties on the two sides of this controversy. Of course, if the fiduciary relation did not exist there is nothing to discuss. We rest our answer to Question 1b upon the broad ground that assuming the Cliffs' position to be fiduciary in character (or to involve results of that relation), the only remedy open to the Arctic after full discovery of the terms of the contract between the Cliffs and the Oliver was rescission of the lease. The decree and the accounting awarded plaintiff below permits the Arctic Company to confiscate the property rights held by the Cliffs back in 1899 and which rights it in good faith surrendered in order that the Arctic (through Kaufman and Breitung) might be free to lease this property. This lease,

unattainable except by the surrender of the Cliffs' independent rights, is still held and enjoyed by the Arctic Company.

The suit for an "accounting" considered as a form of action as prosecuted by plaintiff here should not be confused with a suit for an "accounting" following rescission which might have been plaintiff's right had plaintiff elected to avoid the new lease. In the case at bar the "accounting" awarded by the District Court gave plaintiff the "contract" itself in its entirety. In the case of rescission the "accounting" would give plaintiff the avails of the property parted with by the plaintiff when it executed the new lease.

QUESTION No. 2a.

Kaufman and Breitung, considered as the real plaintiffs, are not in court with clean hands.

Primarily a suit to recover for a wrong done to a corporation must be brought by the corporation itself. No stockholder may institute such an action until he has exhausted every available means to get the corporation to bring the suit.

Foss vs. Harbottle, 2 Hare 461;
Hawes vs. Oakland, 104 U. S. 450, 454-461;
Holton vs. Ry. Co., 138 Pa. St. 111;
Dumphy vs. Travelers Newspaper Assn., 146 Mass. 495.

The case at bar while nominally in the name of The Arctic Company, was not instituted by the corporation but by Kaufman and Breitung. The Circuit Court of Appeals found:

"In 1904 Kaufman and Breitung first acquired knowledge of the fact that the Cliffs had this interest in the lease. Thereupon and without any action by the stockholders or directors of the Arctic, or any request therefor, Kaufman and Breitung caused a bill of complaint in this cause to be filed in the name of the Arctic as complainant and executed by Kaufman, President, and Breitung, Director." (Rec., p. 6.)

Considering the limited business of this corporation no additional force was given to the filing of this bill because Kaufman as President united in executing it.

Cyc. of Law & Procedure, Vol. 10, p. 903;
Cook on Corporations, 6th Ed., Vol. 3, Sec. 716;
Morawetz on Private Corporations, Vol. 1, Sec 537;
Clark & Marshall on Corporations, Vol. 3, Sec. 701;
Thompson on Corporations, Vol. 6, Sec. 7374, 4629;
Ashuelot Mfg. Co. vs. Henry Marsh, 1 Cushing (Mass.) 507;
Hudson River, etc., R. R. Co. vs. Hay, 14 Abbott Prac. N. S. (N. Y.) 191.

In *Machen on the Modern Law of Corporations,* the author says (Sec. 1139):

"Discontented stockholders have sometimes, especially in England, taken the bull by the horns and brought suit in the name of the corporation as plaintiff. Where this bold course is followed, upon the face of the proceedings the suit appears properly framed, and the bill or declaration would be good on demurrer. The defendant's proper course is to move that the bill be taken from the files, or that the name of the corporation as plaintiff be stricken out, on the ground that the company did not authorize the bringing of the suit."

Defendants in our case in their answer denied that the corporation had brought the suit and asserted that it was in reality brought by Kaufman and Breitung, individually, for their own benefit, and they asked that the case should be dismissed.

This objection was renewed in the Circuit Court of Appeals, and it was there further urged that if the objection was overruled and the case retained it should, nevertheless, be treated as if brought by Kaufman and Breitung, individually, and not as a suit by the corporation.

In the last part of the record in this Court (see p. 10) the Court of Appeals said:

> "We have considered and reached a conclusion concerning several issues of law not covered by any question certified, and several issues of fact not mentioned herein."

It is quite evident from this statement, taken in connection with the above quotation from page 6 of the record and the language employed by the Circuit Court of Appeals in propounding Question 2a, that the court below decided to retain and not dismiss this case, but to treat it as if brought by Kaufman and Breitung, individually, in their own names. This course is consistent with the principles and rules of equity.

Equity Rules, Nos. 29, 81;
Eagle Iron Co. vs. Colyar, 156 Fed. 954.

Kaufman and Breitung negotiated the lease in question for and on behalf of the Arctic (findings 10 and 12, Rec. p. 5).

They took advantage of their position as officers and directors of the Arctic to demand a benefit for themselves personally.

The court found (see finding 14, p. 7) that:

> "In closing the terms of the lease with the Oliver, they (K. and B.) insisted, as a condition of making the lease, that the Oliver should buy this Rees one-fourth interest in the fee of this parcel for $131,500.00 cash. The Oliver acquiesced and paid that sum * * *. The price so received by K. and B., $131,500.00, was twice the then fair value of the one-fourth interest purchased, and the Oliver purchased the same not because it otherwise desired such interest, *but because it was necessary to make the purchase at this price in order to get the lease from Kaufman and Breitung.*" (Italics ours.)

How can Kaufman and Breitung, stockholders, directors and officers in the Arctic (owning one-half of the stock), ask a court of equity for relief against defendants owning the other half of the stock on the ground that defendants as stockholders, officers and directors violated their duty to the Arctic and secured a personal benefit thereby, when the complaining parties were guilty of the same wrong to the Arctic in the same transaction which they charge against the defendants?

The author of *Cyclopedia of Law and Procedure* (Volume 16, p. 144) says that the maxim "clean hands"

> "expresses rather a principle of inaction than one of action. It means that equity refuses to lend its aid in any manner to one seeking its active interposition who has been guilty of unlawful or inequitable conduct in the matter with relation to which he seeks relief."

Pomeroy in his work on *Equity Jurisprudence* (Section 397), speaking of this maxim, says:

> "On the other hand, the maxim now under consideration, 'He who comes into equity must come with clean hands,' is much more efficient and restrictive in its operation. It assumes that the suitor asking the aid of a court of equity has himself been

guilty of conduct in violation of the fundamental conceptions of equity jurisprudence, and therefore refuses him all recognition and relief with reference to the subject-matter or transaction in question. It says that whenever a party, who, as actor, seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience, or good faith, or other equitable principle, in his prior conduct, then the doors of the court will be shut against him *in limine;* the court will refuse to interfere on his behalf, to acknowledge his right, or to award him any remedy."

And in the following section (Sec. 398), Pomeroy said:

"The principle involved in this maxim is merely the expression of one of the elementary and fundamental conceptions of equity jurisprudence."

In *Edward Thompson Co. vs. American Law Book Co.*, 122 Fed. 922, the syllabus states the proposition thus:

"Equity will refuse its aid to a complainant who has himself been guilty of the same inequitable conduct with which he charges respondent."

Other cases holding the like doctrine are:

Cassady vs. Cavenor, 37 Iowa 300;
Tel. Co. vs. Long Distance Tel. Co., 95 N. W. 18;
Chicago Board of Trade vs. O'Dell Comm. Co., 115 Fed. 574.

Justice Field, in *Manhattan Medicine Co. vs. Wood et al.*, 108 U. S. 218, 227, quoted with approval the language of Justice Duer as follows:

"Those who come into a court of equity seeking equity must come with pure hands, and a pure conscience. If they claim relief against the fraud of others they must themselves be free from the imputation."

And then Justice Field said:

> "The doctrine enunciated in all these cases is founded in honesty and good sense. It rebukes fraud and encourages fair dealings with the public."

See also, *Primeau vs. Granfield,* 193 Fed., 911, 912-913.

The maxim is really founded upon public policy, which aims to secure honesty by refusing to recognize claims where the complainant has been guilty of wrongdoing in the transaction in question.

McMullen vs. Hoffman, 174 U. S. 639.

But it will be said that the misconduct of the Kaufman-Breitung interest was discovered by the defendants before the lease to the Oliver Company was consummated, while the alleged misconduct of the defendants remained concealed until shortly before the institution of this suit. And it will be claimed that this "discovery" by defendants in some way helps complainants' case. If the defendants were seeking to recover damages from Kaufman-Breitung on account of the act in question, "discovery" would prevent recovery. The claim, however, that complainant's position is improved by defendants' *discovery* shows a total misconception of the public policy which lies at the foundation of this maxim. This maxim is not designed to protect the defendant. In fact, it finds its most common expression in cases where the defendant is confessedly guilty of wrongdoing, and plaintiff is clearly entitled to a recovery were it not for the fact that plaintiff is *in pari delicti.* This maxim says to a complainant, "your skirts must be clean," and it would seem necessarily to follow that where relief is sought from a defendant on the ground that he was in a fiduciary relation to the complainant, the obligations of which

he had violated, that complainant can have no standing in equity to call such defendant to account if at the same time the complainant was in the same relation to the defendants and was doing the same thing which is charged against the defendant.

Let us test this by an extremely simple illustration: Suppose A and B are partners in business, and as such partners are engaged in negotiations for the sale of partnership property to C. Assume that during the negotiations A goes secretly to C and demands $100 on the side as a condition to his assenting to the firm selling the property. Assume that B likewise goes secretly to C and demands $500 as a condition of his assenting to the sale. Upon B making this demand, C *informs* B that A is also making a demand on him, but that A is only asking $100. C assents to the demand of both parties. The transaction is closed and the bonus paid, $100 to A and $500 to B. Later A discovers that B got $500 and A goes into equity for an accounting, asking that B be required to restore this $500 into the Treasury of the firm. Is there a Chancellor in the land who would give relief?

That the Kaufman-Breitung interest may have received less in value as a result of their violation of duty does not change the situation. A court of equity will not sit in judgment to weigh or measure *degrees* of violation.

In *Pennsylvania Railroad Company vs. Coal Company*, 173 Fed., 1, 9, the Circuit Court of Appeals of the 3d Circuit affirmed as good law the charge given by the Court below to the jury to the effect that the Coal Company could have no recovery against the railroad for damages for discrimination when the Coal Company, plaintiff, had been itself getting rebates, the basis of its complaint against the defendant railroad company being that it gave to other coal companies *larger* rebates

than to plaintiff, and in the Supreme Court of the United States this question was commented on by Justice Lamar (230 U. S. 184, 194-195), wherein he said:

> "The International Coal Company operated a mine in the Clearfield District, and, with its competitors, shipped between 1890 and 1902 large quantities of coal in interstate commerce. In 1904 it sued the Pennsylvania Railroad Company, basing its action, in part, on the fact that prior to April 1, 1899, the Railroad Company had paid other shippers rebates of from 15c to 45c per ton, while paying plaintiff a rebate of only 10c to 25c per ton. Its claim for a sum equal to the difference between the rebate paid to it and that given to other shippers was eliminated by the trial judge on the ground that 'courts do not sit to measure the difference in degree in violation of the law in favor of one party or the other. The question of the money value that each of them received in their violation of the law will not be looked into, * * * not for the purpose of relieving the defendant, but because the plaintiff is just as culpable * * * and as much a violator of the law as the defendant.' "

Pomeroy in his Work on Equity Jurisprudence, says:

> "The special rules contained in the foregoing paragraphs will serve to illustrate the meaning and operation of the principle. He who comes into a court of equity must come with clean hands; but they by no means exhaust its scope or effect. It is not alone fraud or illegality which will prevent a suitor from entering a court of equity; any really unconscientious conduct, connected with the controversy to which he is a party, will repel him from the forum whose very foundation is good conscience." See *Pomeroy*, Sec. 397-404.

Kaufman and Breitung as the real plaintiff can, therefore, have no recovery. Whatever duties rested upon defendants likewise rested upon them. *They were themselves doing the very thing they complain of in defendants.*

QUESTIONS Nos. 3a and 3b.

The contract between the Oliver and the Cliffs and all the benefits received by the Cliffs thereunder as the result of carrying out such contract must be treated in the same way as though it were a lump sum in cash paid by the Oliver to the Cliffs for what the Cliffs was required to do. It was the duty of Kaufman and Breitung to have made inquiry when they were informed of the agreement reached by the Oliver and the Cliffs if they cared to know what that agreement was.

At Corrigan's suggestion negotiations between the Oliver and the Cliffs were commenced and resulted in the contract heretofore mentioned to be later carried out in the event Kaufman and Breitung decided to lease to the Oliver.

> "This understanding between the Cliffs and the Oliver being had, Kaufman and Breitung were directly or indirectly informed and fully understood that an agreement had been reached between the Oliver and the Cliffs because of which the Cliffs would no longer object to the Oliver lease; that Kaufman and Breitung were at liberty to go ahead on behalf of themselves and the Arctic and negotiate the best terms they could get from the Oliver; and that when the terms had been agreed upon satisfactory to Kaufman and Breitung and the Oliver, the Cliffs, as the controller of the existing leases which blocked the way, would consent to their cancellation; and the Cliffs as a stockholder in the Arctic would sanction, and Mather and Hayden as directors in the Arctic would approve, and Mather as an officer of the Arctic would execute a lease embodying such terms. *Kaufman and Breitung made no inquiry concerning the terms of the agreement which they thus learned had been made between the Cliffs and the Oliver.*" (Rec., p. 5, finding No. 10).

In equity knowledge of a fact carries with it notice of all such other facts as reasonable inquiry would disclose.

Wood vs. Carpenter, 101 U. S. 135, 141;
New Albany vs. Burke, 11 Wall. 96, 107;
Foster vs. R. R. Co., 146 U. S. 88, 99;
Johnson vs. Standard Mining Co., 148 U. S. 360, 370;
Jessup vs. Railroad Co., 43 Fed. 483, 503.

The foregoing rule is subject to one exception; the *cestui* is not bound to suspect his trustee of wrongdoing, from which arises the affirmative duty of the trustee to make disclosure.

In *Kessler vs. Ensley Company,* 123 Fed. 546, 564, the court said:

> "Quite true, it is that one is not ordinarily bound to suspect his trustee, and may presume, without inquiry, until he is advised to the contrary, that his trustee is acting fairly; but the right to rely upon this presumption is destroyed when the *cestui que trust* is warned by actual knowledge, or what is the same thing, fair and aggressive notice, that the trustee is faithless to his duty, and is himself assailing his trust. A *cestui que trust* is then bound to make seasonable inquiry, and to act promptly, if he wishes to rescind contracts such as those here involved."

Our case is not within the rule as to fiduciaries above set forth, but rather within the principles of the special exception noted. While Mather bore the title "director," the manner of his selection as *special* representative of one interest, the paramount control of the property of the corporation reserved and exercised by the stockholders themselves, the fact that he was known to all to be representing the independent property rights of the Cliffs, together with the other facts and circumstances of this case hereinbefore set forth bring the case at bar

within the exception. The facts stated are the equivalent of the "aggressive notice" in the foregoing authority. In law anything which gives the *cestui* in effect clear notice is sufficient. The agreement or understanding that Kaufman and Breitung would look after their own interests and that Mather (special representative of the Cliffs as a director in the Arctic) should as president of the Cliffs take care of the Cliffs interests in the negotiation with Oliver and their knowledge that his duty to the Cliffs required him to get for it as large a consideration as possible for what it was asked to do were sufficient notice to them that he was acting in the interest of the Cliffs. So long as Mather did nothing to further the making of the lease, leaving that entirely to Kaufman and Breitung, Mather's duty, under the peculiar circumstances of this case, there being no fraud, was no different from what it would have been if the contract with Oliver had called for a cash consideration alone.

Mather's only act in connection with the lease as an official of the Artic was the act of attestation as Secretary, which act as heretofore pointed out was in view of the action of the stockholders purely ministerial.

Looking at the question from its legal aspect we believe there can be only one answer to Question No. 3.

Upon equitable grounds also the answer must be the same. The case is different from what it would be if the Cliffs Company had agreed to use, or, in fact, had used Mather's influence to bring about or fix the terms of the Oliver lease. There was no fraud or dishonesty. Mather personally received nothing. The lease in question was a good one for Kaufman and Breitung and the "interest" which the Cliffs received in the lease actually increased the value of that lease (Finding 17, p. 8) which Kaufman and Breitung retain and enjoy.

It is not out of place to again revert to the demand Kaufman and Breitung were making that the Oliver buy some of their private property at *twice its real value.*

They were apparently wholly indifferent as to the terms of the Cliffs' contract, so long as they were left free to lease their own three-fourths on their own terms and make a profit of $60,750.00 in the sale of a piece of their private property (Finding No. 14).

QUESTIONS Nos. 4, 5 and 6.

The corporation, the Arctic Iron Company, was a mere business convenience created by the parties interested in the property to hold the title thereto. The stockholders acted as principals and each negotiated in respect to his interest independently of the others. The directors and officers were used simply for the purpose of legalizing in corporate form the agreements entered into by the stockholders as principals. Under the circumstances disclosed in this case it was the stockholders who acted and the directors were not fiduciaries. Under such circumstances equity will look through the fiction of the corporate entity to the natural persons beyond and will give or refuse relief according to the just rights of such persons.

The relation of a director of a Company to the corporation has been variously characterized as "agent," "trustee" or "managing partner." In respect to this subject, Bowen, L. J., in *Imperial Hydropathic Hotel Co. vs. Hampson,* 23 Ch. D. 1, 12, said:

> "When persons who are directors of a company are from time to time spoken of by judges as agents, trustees, or managing partners of the com-

pany, it is essential to recollect that such expressions are used not as exhaustive of the powers or responsibilities of those persons, but only as indicating useful points of view from which they may for the moment and for the particular purpose be considered—points of view at which they seem for the moment to be either cutting the circle or falling within the category of the suggested kind. It is not meant that they belong to the category, but, that it is useful for the moment to observe that they fall *pro tanto* within the principles which govern that particular class."

In the ordinary business corporation the relation of director is undoubtedly fiduciary in character as to the corporation and in a sense also as to stockholders.

Breslin vs. Fries-Breslin Co., 70 N. J. L. 274-281-282-284.

The real owners—the stockholders, are numerous and absent having confided the business management of the corporation to the directors. Justice Davis in *Cumberland Coal Co. vs. Sherman*, 30 Barb. 553, 569, after referring and quoting from *Michoud vs. Girod*, 4 How. 503, states the underlying thought governing this relation of directors to the stockholders as follows:

"* * * Those who assume the position of directors and trustees assume also the obligations which the law imposes on such a relation. *The stockholders confide* to their integrity, to their faithfulness, and to their watchfulness *the protection of their interests.* This duty they have assumed, this the law imposes upon them, and this those have, whom they *act for*, a right to expect. *The principals are not present to watch over their own interests, they can not speak in their own behalf, they must trust to the fidelity of their own agents.*" (Italics ours.)

In *Duncomb vs. New York etc. Railroad Co.*, 84 N. Y. 190, 198, the court, after having stated that there

could be no doubt of the rule that the character of director was fiduciary, said:

> "But the rule was adopted to secure justice, not to work injustice; to prevent a wrong, not to substitute one wrong for another; and hence have arisen limitations upon its operation, calculated to guard it against evil results as inequitable as those it was designed to prevent."

See, also *Colgate vs. Leather Co.*, 73 N. J. Eq., 72, 86.

In *Colton vs. Stanford*, 82 Cal. 251, the court held that where the facts show that no confidence was reposed by the *cestui* in the trustee, but that the *cestui* acted exclusively upon the advice of disinterested parties, honestly given, who were specially fitted because of their ability and familiarity with the affairs to give such advice that she could not claim a breach of the fiduciary relation. The court there said to hold the trustees liable as fiduciaries under the circumstances in that case

> "would convert a rule intended to prevent fraud into one creating an incentive and a cover for fraud."

The confidence implied because of and growing out of the managerial relation of directors is the underlying thought.

Questions 4 and 5 propounded by the court below recognize the fiduciary relation of a director in the ordinary corporation, and present for our consideration whether Mather under the peculiar facts of this case sustained such relation.

These questions call for a consideration of the effect to be given to the legal entity of the Arctic corporation and the rights of Kaufman and Breitung and the defendants growing out of their association together in

such corporation. Must we regard the legal entity as controlling regardless of the real situation of the parties and is a court of equity bound thereby, or may equity look through the corporation to the real parties in interest and determine this case according to the just rights of such parties?

The modern authorities establish the following propositions:

(1) In equity the conception of a corporation is that it is merely an aggregation of natural persons associated together under a statutory designation.

(2) Equity, when necessary to do justice, will, whenever possible, look through the fiction of the corporate entity to the natural persons beyond and will give or refuse relief according to the just rights of such persons.

Morawetz on Private Corporations, Sec. 227, says:

"The statement that a corporation is an artificial person or entity, apart from its members, is merely a description in figurative language of a corporation viewed as a collective body; a corporation is really an association of persons, and no judicial dictum, or legislative enactment can alter this fact. It is true that courts of law, as distinguished from courts of equity, do not, as a rule, look beyond the fiction of a separate corporate entity. * * * In equity, the conception of a corporate entity is used merely as a formula for working out the rights and equities of the real parties in interest; while at law this figurative conception takes the shape of a dogma and is often applied rigorously without regard to its true purpose and meaning. In equity, the relationship between the shareholders is recognized whenever this becomes necessary to the attainment of justice; at law this relationship is not recognized at all."

And in Sec. 229, the same author says:

"As a general rule, a corporation is not affected by the personal rights and obligations and transactions of the shareholders who form the corporation, yet this rule cannot be applied blindly; a court of equity will look beyond the technical doctrine whenever this becomes necessary to do justice between the parties."

The same idea is found in Sec. 237, also in *Taylor on Corporations,* Sec. 51, also *Clark & Marshall on Corporations,* Sec. 7, (d), (e), (f), (g).

The Supreme Court of Ohio has recently said:

"The idea that a corporation is an entity distinct from the corporators who compose it has been aptly characterized as 'a nebulous fiction of thought' * * *. When all has been said it remains that the corporation is not in reality a person or a thing distinct from its constituent parts, and the constituent parts are the stockholders as much so in essence and in reality as the several partners are the constituent parts of a partnership." *Cincinnati Volkblatt vs. Hoffmeister,* 62 O. S., 189, 200.

Pitney, J. (now associate justice of the Supreme Court) in *Breslin vs. Fries,* 70 N. J. L. 274, 282, said:

"In the eye of the *law,* corporations are entities separate and distinct from their constituent members and not bound by the individual acts of the latter. The *law* deals with the corporation as an artificial person. *Equity* realizes that this legal entity is but a legal fiction; looking through the form it discerns the substance. It finds that a stock corporation is in essence an aggregation of individuals, a statutory partnership with assignable membership and limited liability of the members, and so the doctrine of equitable estoppel applies fully to all the internal concerns of stock companies. Saving, so far as public policy and the interests of creditors and other third parties are concerned (none of

which is involved in the present case), the stockholders may bind themselves *inter sese* and in favor of the corporation by their own acts and agreements, and what will bind *all* the stockholders with respect to an obligation from the company to one of its members, will bind the company as such."

There are, of course, situations where a court of equity may be compelled to recognize the legal entity, even though an inequitable result as to some stockholders is thereby brought about. Such a situation arises when there happen to be innocent stockholders and some stockholders who equitably should have nothing, and the corporation sues for a wrong done to it. The parties are not before the court in such a way as to permit full justice to be done to all. The corporate action is not defeated by the fact that some of the shareholders are equitably entitled to nothing (*Davis vs. Las Ovas Co.*, 227 U. S. 80, 86-87).

Where, however, it is inequitable for all the natural persons to have a recovery the corporation itself will be denied relief.

Whatever binds or estops all the stockholders has the same effect upon the corporation:

Old Dominion Copper Co. vs. Lewisohn, 210 U. S. 206;
Foster vs. Seymour, 23 Fed. 65, 66;
Seymour vs. S. F. C. Ass'n, 144 N. Y. 333, 343;
Tompkins vs. Speery, 96 Md. 560, 584;
Great Western Mining Co. vs. Harris, 128 Fed. 321;
Leigh vs. Kewanee Mfg. Co., 127 Fed. 990;
Perkins vs. Trintz, 69 N. J. Eq. 723;
Miller vs. University Magazine Co., 10 Misc. (N. Y.), 311;
Morawetz on Corporations, 2d Ed., Sec. 630;
Hutchinson vs. Simpson, 92 App. Div. (N. Y.) 382, 396;

In re *Ambrose Lake Tin & Copper Co.*, L. R. (1880), 14 Chan. Div. 390, 399;
Old Dominion Copper Co. vs. Lewisohn, 136 Fed. 915; same, C. C. of App., 148 Fed. 1020;
Kellerman vs. Maier, 116 Cal. 416, 422-3;
McCracken vs. Robison, 57 Fed. 375.

In the Old Dominion Copper Co. case (148 Fed., 1020, ante), the court said:

> "The fundamental difficulty with the bill is that it fails to state any facts showing that the complainant (the corporation) was in any way injured or defrauded by the transactions complained of. At the time of the transfer by Bigelow and Lewisohn to the company, Bigelow and Lewisohn, and their representatives, owned the entire issue of stock of the corporation. The sale by them to the corporation was in effect, a sale by them to Bigelow and Lewisohn. A corporation can only act through the human beings who compose it. It cannot be deceived or defrauded, unless its stockholders and directors are deceived or defrauded. The corporation knew all that Bigelow and Lewisohn knew, and no one of the original parties to the transfer was defrauded by the exchange of the stock controlled by Bigelow and Lewisohn for the real estate controlled by them." (Affirmed, 210 U. S., 206).

On principle from what we have said it would follow that when a stockholder being unable to get his corporation to bring suit, starts the suit himself, that his recovery ought to depend upon his own relation to the subject matter of the suit. He should be held subject to the equities of his own position. The authorities clearly settle that such is the law.

Clark & Marshall on Corporations, Sec. 553 (a), (b).
Morawetz on Corporations, Secs. 262-264 and cases cited.

Home Fire Insurance Co. vs. Barber, 67 Neb., 644.
Arkansas River Land, etc. Co. vs. Trust Co., 13 Colo., 587.
Breslin vs. Fries, 70 N. J. L., 274, 282-284.

Thus, *Clark & Marshall* (Sec. 5533) says:

"A stockholder who participates as an officer or as a stockholder in illegal or ultra vires transactions on the part of the directors or stockholders, or consents thereto, or who, with full knowledge of the intention to engage in such transactions, acquiesces therein, instead of objecting and taking steps to prevent the same, is estopped to afterwards sue in equity to set the transactions aside; and it can make no difference that he sues on behalf of himself and other stockholders, *and that there are other stockholders who might maintain the suit.*" (Italics ours.)

In *Morawetz on Corporations* (Secs. 262 *ante*), the author, after discussing the right of a corporation to sue when there are both innocent and guilty stockholders, says:

"There is, however, evident propriety in refusing to allow a shareholder to sue on account of a wrong which he has voluntarily acquiesced in and condoned, even although the corporation might sue for his benefit. The plaintiff, under these circumstances would have no meritorious cause of complaint, and *he would be allowed to share in the benefits of a recovery by the corporation merely because it would be impossible to separate his interest from the interests of the other shareholders.* If the remaining shareholders should subsequently acquiesce in the transaction, the corporation itself would be bound, and the entire cause of complaint be barred. Individual shareholders, who have acquiesced, should at least be disqualified from suing where the other shareholders and the company, through its agents, have taken no steps to assert its rights." (Italic ours.)

The same principle is extended and applied to cases where a stockholder has attempted to bring suit in his own name for a liability to his corporation, when the transaction complained of occurred prior to the time that he acquired his stock. The authorities are substantially all one way, that he may not bring such a suit unless he *owned* the shares at the time the wrong was done, or unless his ownership devolved upon him by operation of law.

Hawes vs. Oakland, 104 U. S., 450.
Dimpfell, etc., vs. Miss. Ry. Co., et al., 110 U. S., 209.
Taylor vs. Holmes, 127 U. S., 489.
Gas Co. vs. Fuel Co., 145 Pa. St., 13.
Alexander, Trustee, vs. Searcy, 81 Ga., 536.
Clark vs. Coal Co., 86 Ia., 436.

The foregoing principles find further illustration in many cases.

A mortgage made by all the stockholders is a valid mortgage in equity.

Bundy vs. Iron Co., 30 O. S. 300, 311-312;
Bank vs. Winchester, 119 Ala. 168;
Swift vs. Smith, 65 Md. 428.

See also:

Eureka Iron Co. vs. Bresnahan, 60 Mich. 332, 337;
Thompson on Corporations, Vol. 3, Secs. 3976, 3978.

A mortgage given by the President and Secretary of a corporation without any action by the Board of Directors, but with the consent of all the stockholders is valid.

Ry. Co. vs. Ry. Co., 47 Fed. 15, 19-20;
Kalamazoo Spring etc. Co. vs. Winans, etc., 106 Mich. 193.

A resolution by a Board of Directors cannot be assailed by the stockholders where the stockholders are the same people as the directors.

TenEyck etc. vs. Pontiac Railway Co., 74 Mich. 226, (last par. pg. 234).

There is no fiduciary relation in such cases.

McCracken vs. Robison, 57 Fed. 375;
Harbor vs. Manning, 94 Texas, 558;
Tyler vs. Hamilton, 62 Fed. 187, 189;
Gillett vs. Bowen, 23 Fed. 625, 626.

It will be noted that three of the above mentioned cases involve corporations of the State of Michigan.

West vs. Camden, 135 U. S. 507, 520,
illustrates the same principle.

A large stockholder and officer in a corporation, made a contract with the plaintiff whereby he agreed that plaintiff should be retained as an officer in such corporation. This contract was held non-enforceable as against public policy because,

"contrary to the duty which * * * (defendant owed) to that company and to the *stockholders other than the plaintiff.*"

In *Wright vs. Warren Brothers Co.*, 204 Fed. 231, 236-237, the suggested exception in *West vs. Camden* was recognized and applied and the contract before the court was held valid because there were *no* stockholders *other than the defendant whose rights had to be protected.*

In *Hill vs. Wilson*, 210 Fed. 200, it was held that a *bill* to recover property for a corporation from officers of such corporation on the ground of fraud *must show* that there are creditors or *other stockholders* who were in fact injured or defrauded.

That the relations of stockholders may be such as the parties *agree* to make it, was held by this court in

Beardsley vs. Beardsley, 138 U. S. 262, 267-271.

While the corporation is ordinarily a necessary party to a suit by a stockholder to enforce a right against the corporation, yet such corporation is held not to be a necessary party where *all* the stockholders who have agreed to convey the corporate property are made defendants in a suit to compel specific performance of the contract.

McCullough vs. Southerland, 153 Fed. 418.

See:

Jorden etc. Co. vs. Collins etc. Co., 107 Ala. 572;
M. J. Grah & Sons vs. Grah, 80 N. Y. App. Div. 85;
Rager Kapner vs. Altmarck, 157 Fed. 609.

It has long been the settled doctrine that stockholders who undertake to make use of the corporate form for fraudulent purposes may be reached and controlled as individuals.

State vs. Standard Oil Co., 49 O. S. 137;
People vs. Sugar Refining Co., 121 N. Y. 582;
Distilling etc. Co. vs. People, 166 Ill. 448;
Ford vs. Chicago Mill etc. Association, 155 N. Y. 166;
U. S. vs. Milwaukee Refining Co., 142 Fed. 247.

Recent decisions on this same subject are:

Northern Securities Co. vs. U. S., 193 U. S. 197;
U. S. vs. Lehigh Valley Ry. Co., 220 U. S. 257.

See also:

Home Fire Ins. Co. vs. Barber, 67 Neb. 644;
Arkansas River Land, etc. Co. vs. Trust Co., 13 Col. 587.

In *Home Fire Ins. Co. vs. Barber,* the questions involved here are discussed with great thoroughness and

argued and reasoned out upon principle in a way that leaves little to be said. In one place the court said:

> "It is but another application of the same principle to hold that where no question of title is involved, but some equitable remedy is sought in the corporate name, depending purely upon the doctrines of the court of equity, the court, to prevent abuse and perversion of its doctrines and remedies, will look through the corporation to the real parties in interest, and, if those parties have no standing in equity, will refuse the remedy." * * *
>
> "To permit persons to recover through the medium of a court of equity that to which they are not entitled, simply because the nominal recovery is by a distinct person through whom they receive the whole, actual and substantial benefit, and that nominal person would, in ordinary cases as representing beneficiaries having a right to recover, be entitled to relief, is a perversion of equity. It turns principles meant to do justice into rules to be administered strictly without regard to the result. It is contrary to the very genius of equity. When the corporation comes into court and seeks equitable relief, we ought to look at the substance of the proceeding, and if the beneficiaries of the judgment sought have no standing in equity to recover, we ought not to become befogged by the fiction of corporate individuality and apply the principles of equity to reach an inequitable result.
>
> "Hence, we think the rule to apply to such cases is this: Where a corporation is proceeding at law, or where it is asserting a title to property, or the title to property is involved, the corporation is regarded as a person separate and distinct from its stockholders, or any or all of them. But where it is proceeding in equity to assert rights of an equitable nature, or is seeking relief upon rules or principles of equity, the court of equity will not forget that the stockholders are the real and substantial beneficiaries of a recovery, and if the *stockholders*

have no standing in equity, and are not equitably entitled to the remedy sought to be enforced by the corporation in their behalf, and for their advantage, the corporation will not be permitted to recover. This rule finds many illustrations in the authorities."

A very large collection of authorities on this general subject is contained in *Cook on Corporations*, 7th Edition, Vol. 1, Sec. 3. A very late case is *Sargent vs. Palace Cafe Co.*, 167 Pac. Rep. 156.

That a so-called director may not be a fiduciary because of mere possession of the title of director is illustrated by the rule with respect to dry trustees.

Perry on Trusts, Section 199, says:

"The above rule does not apply to mere naked or dry trustees who practically have no interest in or power over the estate, as trustees to preserve contingent remainders. (a) Where the trustee has no duty to perform, as where one is trustee in fee for another in fee, having no authority over the estate, and standing in no relation of influence over the *cestui que trust*, the person named as trustee may purchase; and if the *cestui que trust* make all the arrangements for the sale, such as plans, notices, choice of auctioneer, terms and conditions, and the trustee is in no situation to obtain any exclusive information, the court will deal with the contract as with contracts between other parties." * * *

In *Erwin vs. Oregon, etc. Co.*, 27 Fed., 625, in speaking of the disability of a trustee from buying property from the *cestui que trust*, the court says, page 632:

"The reason why this disability does not apply to a mere dry trustee is because his position gives him no vantage ground of superior information or undue influence over the *cestui que trust.*"

An agency in fact must exist at the time.

Mechem on Agency, Section 1235, 1236, says:

"It must be constantly borne in mind that, in order to make the rules here dealt with applicable, the relation of agency must exist between the person claiming the benefit of the rule and the person against whom the rule is sought to be enforced. * * *"

"And not only must there be agency, but it must also be agency for the person who now claims protection as the principal. Thus it has been held that the agent of one of two tenants in common can not be charged as trustee for the other tenant, where he was not the agent of that tenant and his own principal consented to what he did.

"The agency also must be one which involves a duty having some reference at least to the subject-matter of the claim now made. If there be no agency, and hence no duty, with reference to that subject-matter, no duty of loyalty arises in respect of it, and no foundation of any rights growing out of that duty can be laid."

In this connection see:

Cole vs. Trecothic, 9 Ves., 234. Defendant, being pressed on a judgment assigned certain premises to W. C. and W. S. as trustees to sell. He was allowed to retain control, however, and made all arrangements for the sale of the property, fixed his price, etc. This property failed to bring his price at auction, so was divided into lots. The defendant also fixed the price of these lots and hired his auctioneer. The trustees interfered in no respect whatever. W. C., one of the trustees, contracted with the auctioneer to purchase one of the lots for his father for 20,000£. After the contract was made, another party offered 25,000£ and the defendant sought to avoid the contract. This was an action for specific

performance. Lord Chancellor Eldon, delivering the opinion, said, page 247:

> "In this case you are not met by the danger that the trustee may buy with knowledge acquired at the expense of the *cestui que trust*, that the value may be considerably more than he was aware of. * * * Where there is a trustee made so under such an instrument as this, the whole execution of the trust devolved upon the *cestui que trust*, and he takes all upon himself, * * * and therefore has all knowledge, what is the proper price; if any case can exist for relaxing the rule by the consent of the parties this is the case."

Specific performance was granted.

That the agent must be an agent to sell was expressly held in *Douglass vs. Lougee*, 147 Iowa, 406 (1910). In that case an agent to lease and collect rents secretly purchased the property of his principal. The court held that under such circumstances as to the *sale* the agent and the principal dealt at arms' length, and there being no actual fraud such as would vitiate an ordinary contract, the agent was not bound to account to the principal for a profit made on a resale of the property.

If an ordinary agent or trustee is relieved of the disabilities ordinarily attending such a relation when the principal himself retains control and management, why may not the same situation arise as to directors of corporations when the stockholders in fact manage and control the corporation?

The Michigan statute expressly provides as follows:

> "No alienation, division or mortgage of any or any part of the mine works, real estate or franchise of any corporation mentioned in the first section of this Act shall have any force or effect or pass any

title thereto or interest therein, unless expressly authorized by the vote of three-fifths of the Capital Stock of said Company, at some meeting of stockholders called and notified in accordance with the provisions of Section IX of this Act."

Howell's Michigan Statute, 2nd Edition, Chapter 151, Section 24.

A lease of mining property is an alienation thereof.

Stoughton's Appeal, 88 Pa. St. 198, 201, 202.
Scranton vs. Philips, 94 Pa. St. 15, 22.
Coltness Iron Co. vs. Black, 6 App. Cas. 315, 335.

In *Coltness Iron Co.,* Lord Blackburn said:

"What we call a mineral lease is really, when properly considered, a sale out and out of a portion of the land."

In *Beecher vs. Marquette etc. Rolling Mill Co.,* 45 Mich. 203, 209, Cooley, J. said:

"The statute * * * was passed to protect the interests of stockholders in mining companies. It intends that their mining property shall not be conveyed away or mortgaged except by their deliberate action." * * *

A similar statute of Colorado was before the Circuit Court of Appeals in *Westerlund vs. Black Bear Mining Co., et al,* 203 Fed. 599.

We assert with confidence, therefore, that the authorities show: that the court will look through the legal entity whenever the corporate form is adopted for any fraudulent or other illegal purpose; that all the stockholders (there being no creditors) in private business corporations may act *inter sese* in respect to the corporate property in any manner agreed upon; that each stockholder may lawfully agree to look after his own interests in the corporation in such way as precludes

either from making any claim against the other (unless there should be actual fraud) and that such an agreement may be implied from the acts and conduct of the parties.

From the records in our case it plainly appears:

(1st) There were only two stockholders, each one owning just half the stock and each one selecting and absolutely controlling two of the four so-called directors, whom the court finds were the representatives of the stockholders selecting them.

(2nd) The corporation was created simply to hold title to the land in question. It was organized and maintained with a perfect balance of power in order to enable each to control the situation.

(3rd) Each stockholder was entirely competent to look after his interest in the Arctic, and in fact did so. Neither in any manner whatsoever relied upon or depended upon the other or the directors selected by such other to look after his interests. There was a total lack of that trust and confidence which lies at the foundation of the fiduciary relation. There was no breach of duty, no fraud and no betrayal of confidence. Neither side influenced the other in the slightest degree.

(4th) Each side had other interests in the property in which the Arctic was interested and each side considered itself free to take care of its separate interests whenever they conflicted with the interest of the Arctic Company. Each side knew of the other's interest and *knew* that the other was taking care of his interests.

(6th) All the parties are in court. There are no creditors, no other stockholders and no outside interests to be considered. While the suit is brought in the name

of the Arctic Company the finding is that it is in reality brought by Kaufman and Breitung. The recovery is solely for Kaufman and Breitung's benefit.

If neither the corporation or any stockholder can complain when *all* the stockholders act it follows necessarily that no stockholder can complain of the result of his own acts when he has agreed and has looked after his own interests. Where there is no fraud and no advantage is taken of the relation and no dishonesty practiced by one side upon the other, no harm is done to anybody by giving effect to the arrangement so made by the persons interested. *It was the stockholders, the real principals, throughout this transaction that acted. The directors represented nobody but the particular principal that selected them and put them on the so-called Board of Directors. All this existed with the knowledge and consent of everybody.*

The principles which we have here announced and which are supported by abundent authorities dispose of and answer not only Questions 4 and 5, but also Question No. 6. While the term "estoppel" is not used in any of these three questions, the equitable principle involved therein and which we have discussed under the head of "Estoppel" in the first part of this brief, has due application and furnishes the strongest reasons why these questions should be answered favorably to the defendants. The suggestion that Mather might be acting more in accordance with his duty to the Arctic if he resigned and was succeeded by some one else is answered by the court in *Colgate vs. Leather Co.*, 73 N. J. Eq. 72, 86-87. The very organization of the Arctic would be departed from unless the new director was the "representative" of the Cliffs interests. Furthermore, the

agreement and conduct of Mather with the knowledge, consent and agreement of Kaufman and Breitung were the equivalent to a resignation by him as a director, for the purposes of this transaction.

The authorities settle the proposition that courts of equity will not enforce or recognize the legal entity against the wishes and contrary to the interests of all the stockholders, whether such stockholders are numerous or only one. The findings of fact in this case show that there is here what in fact amounted in law to an agreement among the stockholders, each to look after his own interests. That such an agreement will be recognized and sustained by the court is supported by the decision of this court in *Beardsley vs. Beardsley*, 138 U. S. 262, 267, 271. There being no fraud in fact, no breach of duty, no betrayal of confidence, this court should give due effect to the agreement that the parties made and always acted on.

We, therefore, respectfully submit that the general rule that directors are fiduciaries, and which is enforced in ordinary cases, has no application here.

Respectfully submitted,

W. P. Belden,
Horace Andrews,
A. C. Dustin,
Solicitors for the Cleveland-Cliffs Iron Co. and Wm. G. Mather.

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In the Supreme Court of the United States

OCTOBER TERM, 1918.

No. 75. (OLD NO. 324)

THE CLEVELAND-CLIFFS IRON COMPANY and WILLIAM G. MATHER,

vs.

THE ARCTIC IRON COMPANY.

ON CERTIFICATE FROM UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE SIXTH CIRCUIT.

Reply Brief

BRIEF ON BEHALF OF THE CLEVELAND-CLIFFS IRON COMPANY AND WILLIAM G. MATHER, IN REPLY TO BRIEF ON BEHALF OF THE ARCTIC IRON COMPANY,

W. P. BELDEN,
HORACE ANDREWS,
A. C. DUSTIN,
Solicitors for The Cleveland-Cliffs Iron Company and William G. Mather.

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In the statement of facts and throughout their argument appellees' counsel have misconceived the entire scope and purpose of the questions propounded to this Court under the facts as certified, and have argued this case on a theory not warranted by such facts. In advance, therefore, of any corrections of their statements or answer to their arguments, we deem it germane to recur to the certified facts, on the basis of which alone this Court is called upon to answer the questions of law propounded.

There being "no fraud or misleading or breach of directorship duty by Mather unless the same arose wholly as matter of law and as a presumption of law from the relations of the parties" growing out of the failure of the Cliffs and Mather to disclose the fact that the Cliffs had acquired a one-quarter interest in the new Arctic lease, the question involving the legal consequences of such failure is certified to this Court.

This question the Court below stated in the form most favorable to the Appellee in No. 5, and in a narrower form in No. 4. If these questions are answered adversely to plaintiff below, (Appellee here) that will end the case. If answered favorably to plaintiff, questions 1, 2, 3 and 6, present other problems, which, if answered adversely to plaintiff, will bar any right of recovery.

The status of The Arctic Iron Company and the relations which the parties interested in that Company, in law, sustain to each other is therefore the question which logically this Court must first consider and decide. Is the Arctic Company the ordinary business corporation, and are the questions 4 and 5 to be answered according to principles of law applicable to such a situation, or have we a company here so different in its make-up, the purpose of its organization and the use made of it, as makes such principles of law wholly inapplicable.

These questions are propounded by the lower court specially with a view to instructions upon this subject. The language employed in Question 4-a "Under the existing make-up of the Arctic, did Mather as one of the Cliffs' directors," and the language employed in Question 4-b "Under the existing relations of the two bodies of stockholders to each other and to the Arctic," direct the attention of the Court and refer back specifically to

the peculiarities of this Arctic Iron Company and the relations which the parties interested in that Company sustained to each other.

The facts showing the purpose involved in the creation of this corporation, the plan adopted to secure this purpose, the actual use made of the corporation and the relations of stockholders to each other, are fully set forth in the Certificate. This Court has said that in exercising the jurisdiction here conferred, it cannot go into "questions of fact or of mixed law and fact," but that in answering questions propounded it deals "with the facts as thus certified and not otherwise."

Stratton's Independence, 231 U. S. 399, 422.

We therefore assume that each question of law is to be answered in view of the facts so found and that no speculations or inferences may be indulged in respect to other facts.

Let us briefly recur to the facts certified. Healy and Breitung, having arranged to purchase in equal interests an undivided one-half of a tract of land supposed to contain iron ore, organized this Arctic Company "*for the purpose of holding title to this purchase.*" The entire capital stock was divided equally, one-half thereof being issued to Healy and the other half to Breitung, a nominal amount being issued to the respective wives of these two men. Four directors were provided *for* in the *charter* and Breitung was made President and Healy Secretary and Treasurer. In practice Breitung and Healy consulted and agreed upon what leases should be made which were then executed in corporate form. While the corporation had the chartered power to engage in the mining business upon the particular tract of land which it had so acquired, the only business it did consisted of

the leasing of its property under customary mining leases for which it received royalties, although it did some exploration work in the early period of its existence. The corporate expenses were negligible. No salaries were paid. Healy collected the royalties and disbursed them one-half to Breitung and one-half to himself, which, while entered by Healy on his books as dividends, were actually distributed without any action by the directors. The court below found:

> "It was the specific intent of Healy and Breitung, in providing for four directors, to effect a perfect balance of power between the two interests."

After Breitung's death the Breitung interest in these properties was handled in the same manner as in his lifetime

> "and the relations between Healy and Breitung's successors continued the same as between Healy and Breitung." (Finding No. 1.)

The Cliffs having purchased Healy's half of the Arctic stock, there was a stockholders' meeting of that Company held, at which

> "Kaufman, Breitung, Mather and Hayden were unanimously chosen the four directors and Kaufman was made President and Mather Secretary. This choice of directors was in recognition and execution of the plan that two directors should be selected by each stockholding interest. This make-up of officers and directors continued thereafter without change." (Finding No. 7.)

There are other places in the Certificate where the nature of this corporation, or the relations that the stockholders sustain to it and to each other, are found or referred to. For instance, in finding No. 8 the Court says:

> "Two of the four directors had been selected as representatives of the Cliffs,"

and in the latter part of this same finding,

> "each Arctic faction in refusing to consent was inspired by motives of independent interest or feeling aside from interest in the Arctic."

The differences between this corporation and the ordinary business corporation are therefore clear and striking:

1st. The Arctic was organized for the purpose of holding title only and not to engage in business in the normal way. In use it never departed from this purpose.

2nd. It was not given the usual Board of Directors representing all stockholders, vested with discretion and judgment to transact corporate business in the usual way, perhaps against the wishes of some stockholders, but an even number of directors. Two of these directors (Kaufman and Breitung) were the persons who held one-half the stock, and the other two were the President and Attorney of the Cliffs selected to be its special "representatives" on the Board, so that nothing could be done contrary to the wishes of any stockholder.

3rd. Such business as was done in the name of or for the corporation (the leasing of its lands on ordinary mineral leases and the collection of the royalties and the distribution thereof) was in *fact* done by the stockholders acting as such and not by the corporation at all. This was the very purpose of the arrangement.

I.

ERRORS AND OMISSIONS IN APPELLEE'S BRIEF.

Appellees' counsel disregard entirely the limitations prescribed by this Court in *Stratton's Independence, supra*, and the scope of this hearing.

In the first place they undertake to detail what is not stated anywhere, the alleged progress of this case in the various courts below (brief, pp. 1, 2) making the claim that in the District Court

> "a decree was entered in behalf of the plaintiff that defendant should account for the profits derived by the defendant, The Cleveland-Cliffs Company, out of a secret bargain made with the Oliver Company by the Cliffs Company acting through the defendant Mather."

This assertion with respect to "profits out of a secret bargain" with its suggestion and innuendo, is stated and re-stated in too many places to permit of our ignoring the matter altogether or commenting upon it separately. We will, therefore, dispose of the same here once for all.

The Cliffs Company's independent rights, in which the Arctic had no interest, effectually blocked and prevented any new lease. The preliminary agreement between the Cliffs and the Oliver dealt with these rights. It required, in the event that the Oliver and Kaufman and Breitung reached an agreement on the terms of a new lease, that the Cliffs would consent to a novation of the traffic contract and release certain rights therein; accept payment of its unmatured debt from the Queen and surrender control of and consent to the release and cancellation of the existing leases held by the Queen upon this property. The arrangement contemplated that the Oliver Company would buy Corrigan's interest in the old leases, and a part of Breitung's fee, and the Cliffs agreed to contribute one-quarter of all the money needed by the Oliver to carry through its projects and was to receive a one-quarter interest in the new lease. These preliminary agreements were later realized and carried out according to the plan and method set forth

as No. 13 of the findings of fact. A bill was filed in the District Court (Rec., top p. 7) in which there was sought a decree *that all that the Cliffs Company received under this arrangement belonged to the Arctic on the theory that it was held in trust for the Arctic.* That Court granted the relief prayed for and in awarding the property itself to the Arctic awarded the Arctic as incidental to the ownership of such property an accounting of the profits made by the Cliffs from this property in the interval. (Rec. top p. 7.)

The grounds or reasons for the decree in the District Court are manifestly wholly immaterial, and are not covered by any finding in the certificate to this Court. There is no warrant anywhere in the findings of fact for the statement quoted above with its *innuendo of fraud and secret bargaining as the basis of the decree.*

In the second place Appellees' counsel in their so-called "Outline of the Case" omit many facts and add and modify other facts, so that the "outline" becomes in tone and substance materially different from the facts certified. This "outline" is then used as the basis of appellees' whole argument. For instance, in referring to the Arctic Iron Company and its organization, the really vital facts which distinguish this Company from the ordinary business corporation are, in the main, omitted. Thus the very important findings showing how and why this Company was organized, to-wit "for the purpose of holding title" for two people who had arranged to buy the land in equal interests, and that the capital stock was issued half and half to these two people (and their wives) and that the four directors provided for the corporation were determined with the "specific intent to effect a perfect balance of power between the two interests" are omitted altogether. They also dis-

regard the use actually made of the corporation by omitting the fact that the leases which the corporation made were the result of private consultations between Breitung and Healy, and that the royalties from these leases were collected and distributed to Breitung and Healy by Healy himself and not by the corporation. They likewise omit all reference to the facts found that the plans on which this corporation was brought into existence, was continued after Breitung's death by the successors to him and later when The Cleveland-Cliffs Company acquired the Healy stock that the directors then selected were selected as the "special representatives" of each side in accordance with the "plan" on which the Company had come into existence and always been carried on.

They thus endeavor by such omissions to give the Arctic Co. the appearance of the ordinary business corporation.

Having started out with the purpose mentioned, appellees' counsel attempt to soften and minimize the facts found and certified with respect to the manner in which the transaction in question here was negotiated and consummated. Thus on p. 4 of their brief appellees' counsel say:

> "The Queen and Corrigan were largely indebted and Corrigan desired in the summer of 1908 to dispose of the rights and interests of the Queen, and, if possible, to get a new lease or leases upon more favorable terms for the lessees.
>
> "*The then officers of the Arctic Company* knew of Corrigan's desire and indicated a willingness to negotiate for a new lease. Corrigan brought the matter to the attention of both the Cliffs and the Oliver Company. The Cliffs Company notified the *then officers of the Arctic Company* that it desired to negotiate a lease of the Queen properties. No progress, however, was made in these negotiations

prior to the time the Cliffs acquired the Healy stock in November, 1898."

Thus it is made to appear that the Arctic Iron Company, through its "then officers," was consulted and acted in the premises, *but no such fact was found.*

The following is the statement on that subject as certified by the Court below:

> "The Queen and Corrigan were largely indebted and Corrigan desired to sell all the rights and interests of the Queen. *Kaufman and Breitung were notified of this,* and were informed that in this connection Corrigan or his vendees would wish to negotiate a new lease with terms more suitable to the existing market, and *Kaufman and Breitung indicated a willingness* to take up such negotiation. Corrigan undertook to interest both the Cliffs and the Oliver as competitive customers for the Queen interests in connection with such new lease. The Cliffs notified *Kaufman and Breitung* that it desired to negotiate and take such a lease of the Queen properties, but no progress was made toward the arrangement of terms."

In detailing the course of the negotiation the appellees' counsel say (brief, p. 5):

> "In January, 1899, Kaufman and Breitung promised a lease to the Oliver at a fifteen cent royalty on condition that the minimum and other terms could thereafter be agreed upon. The Cliffs thereafter offered to take the lease on the terms which the Oliver might offer, and in addition to pay a bonus. Kaufman and Breitung refused the offer of the Cliffs. Shortly thereafter they were notified that the Cliffs would not consent to the Oliver lease."

The facts as certified by the Court below are materially different:

> "In January Breitung and Kaufman, *for themselves and the Arctic,* promised the lease to the Oliver at a fifteen cent royalty on condition that the

> minimum and other terms could be thereafter agreed upon. Learning of this the Cliffs offered to take the lease at the same terms in all respects which the Oliver *had* offered or *might* offer, and in addition to pay a substantial bonus. Kaufman and Breitung refused, *alleging that they were fairly bound to carry out the arrangement with the Oliver.*"

The standing and financial responsibilities, respectively, of the Cliffs Company and the Oliver, and the fact that Breitung and Kaufman refused to deal with the Cliffs Company, for reasons of personal hostility to Mather, and determined to deal with the Oliver Company, are definitely set out in the Certificate (finding No. 8), but are wholly omitted by the appellees.

The independent rights and interests of the Cliffs Company are specifically found and certified by the Circuit Court of Appeals. (Finding No. 5.) The appellees purport to state these interests and the securities given therefore, but so change the order, and modify and neutralize the facts as to change the effect and minimize and largely do away with the value of the interests so owned and secured. (See appellees' brief pp. 4 and 5.)

The changes here referred to are sufficient and are designed to give an improper coloring to the entire situation.

On p. 6 of their brief appellees purport to give a statement of the agreement between the Cliffs Company and the Oliver Company, and of the facts which came to the knowledge of Kaufman and Breitung. The statement is inaccurate in important respects. After stating the negotiations between the Oliver and the Cliffs Company, and the offer which was made by the Cliffs to the Oliver, appellees say:

"This offer was accepted by the Oliver, and this arrangement made subject to the final negotiations of all the terms of the lease between the Oliver on the one side and the *Arctic represented by Kaufman and Breitung on the other.*

"The fact that the Cliffs had withdrawn its opposition became known to Kaufman and Breitung, and that they were at liberty to go ahead with negotiations on behalf of themselves and the Arctic with the Oliver, and that when satisfactory terms had been reached the Cliffs would assent to the lease. Kaufman and Breitung did not know the terms of the agreement between the Cliffs and the Oliver. *This agreement was not disclosed and the Cliffs* requested the Oliver not to disclose the terms of the agreement."

What the Court below actually certified was the following:

"(9) The Oliver consented, and this arrangement was made subject to the final negotiation of all the terms of the lease between the Oliver on the one side, and *Kaufman and Breitung on the other.* * * *

"(10) This understanding between the Cliffs and the Oliver, being had, Kaufman and Breitung were directly or indirectly informed and fully understood that *an agreement had been reached between the Oliver and the Cliffs,* because of which the Cliffs would no longer object to the Oliver lease; that *Kaufman and Breitung were at liberty to go ahead on behalf of themselves and the Arctic and negotiate the* best terms they could get from the Oliver; and that when terms had been agreed upon satisfactory to Kaufman and Breitung and the Oliver, the Cliffs, *as controller of the existing leases which blocked the way, would consent to their cancellation;* and the Cliffs as a stockholder of the Arctic, would sanction, and Mather and Hayden, as directors of the Arctic, would approve, and Mather, as an officer of the Arctic, would execute a lease embodying such terms. Kaufman and Breitung made no inquiry concerning

the terms of the agreement which they thus learned had been made between the Cliffs and the Oliver.

"(11) The Cliffs knew that if Kaufman and Breitung learned that it was getting one-fourth of the ore they would refuse to go on. The Cliffs and Mather, therefore, then and there did not disclose to them this fact, and requested the Oliver not to disclose the same, and the Oliver complied."

The reason for this failure to disclose had been previously set out by the Court. It arose out of the personal feeling of hostility of Breitung and Kaufman toward Mr. Mather.

On p. 7 of their brief, appellees mildly refer to the profit made by Breitung and Kaufman in connection with and as a condition of making the mining lease, in the following terms:

"In closing the terms of the lease with the Oliver, Kaufman and Breitung insisted that the Oliver should buy a one-quarter interest in their independent fee in one parcel of the mining property. *The Oliver was willing and paid the amount asked.* The Cliffs learned from the Oliver of this purchase before the lease was executed and acquiesced in the Oliver's request that it should buy one-quarter of the interest, or one-sixteenth of the fee, and later paid therefor one-fourth of what the Oliver had paid."

In view of the facts certified and the importance of this subject, this statement is surprisingly incorrect. The following is the correct statement contained in paragraph 14 of the Certificate:

"In closing the terms of the lease with the Oliver they insisted *as a condition of making the lease,* that the Oliver should buy this one-quarter interest of the fee in this parcel for $131,500 cash. The Oliver acquiesced and paid that sum. Kaufman and Breitung did not disclose to the Cliffs that they were making this sale in connection with the lease;

but the Cliffs learned this fact from the Oliver and as a condition of getting a one-quarter of the ore under the lease the Cliffs acquiesced in the Oliver's request that the Cliffs should buy from it one-fourth of this interest or one-sixteenth of the fee at the price of $32,875, and the Cliffs paid that sum in cash to the Oliver. *The price so received by Kaufman and Breitung—$131,500—was twice the then fair value of the one-quarter interest purchased, and the Oliver purchased the same not because it otherwise desired such interest but because it was necessary to make the purchase at this price in order to get the lease from Kaufman and Breitung.*"

On p. 13 of their brief counsel for appellee refer to the conduct of Mr. Mather and set forth a denial of his honesty. They say:

"Finally it is said (p. 8, our brief) that the Circuit Court of Appeals found in the most emphatic way that Mather's conduct was honest. The court will search the findings of fact in vain for any such finding."

This statement is made in the face of the findings as follows:

Section 15:

"Mather neither expected nor received any personal benefit whatever from any of the transactions herein recited."

Section 16:

"Mather exercised no influence or efforts to bring about the making of the lease to the Oliver, nor did he in any way mislead, deceive or defraud Breitung and Kaufman in the subject matter—unless such misleading and fraud are to be inferred as a matter of law from his directorship in the Arctic and his keeping from his fellow directors knowledge that the Cliffs was acquiring an interest."

In the final paragraph of the Certificate, it is stated:

> "Since we are of the opinion that there was no fraud or misleading or breach of directorship duty by Mather, unless the same arose wholly as a matter of law and as a presumption of law from the relations of the parties herein set out, the question so presented has seemed to us proper for certifying to the Supreme Court."

II.

ESTOPPEL.

Appellee denies that the plaintiff is estopped from seeking relief in this case, dividing their argument into Sub-divisions 1 to 6 (their brief, pp. 9-14), and we will briefly reply thereto using the same Sub-divisions.

1. While the words "great value" were nowhere used in the Certificate from the lower court, the debt of $250,000 and the traffic contract described in No. 5, p. 3 of the Certificate were of "great value." As the payment of the one and the full performance of the other were secured by a pledge of the existing leases, the Cliffs did have "contract rights of great value" therein.

2. Our statement that "Kaufman and Breitung refused, without reason, or excuse, to make a new lease to the Cliffs" is criticized. Our statement was predicated on the language of finding No. 8 that there was "no reason for preferring one to the other (Cliffs and Oliver) as lessee," followed by the further finding that the refusal to deal with the Cliffs was prompted by personal feeling, together with the findings later made that this refusal was persisted in notwithstanding the Cliffs' offer to meet any terms made by the Oliver and give a "substantial bonus" besides.

Appellee is outside of and contrary to the record entirely in interposing as an *alleged reason or justification* for *not* leasing to the Cliffs, the *equal division of control of the Arctic and possible future conflict of interests if the lease were made to the Cliffs.*

There are three distinct facts as certified directly opposed to this claim:

(1) There was *no* reason for preferring the Oliver over the Cliffs as lessee.

(2) The refusal to make the lease to the Cliffs was found to be based upon personal animosity.

(3) The only excuse made for not leasing to the Cliffs, when the Cliffs proposed to meet any offer made by Oliver, and give a substantial bonus besides, was that they were fairly bound to carry out the arrangement with the Oliver. (Finding No. 8.)

As this alleged reason is several times repeated in appellee's brief (see pp. 58 to 60, 81) we feel justified in further calling to the Court's attention that *this was one of the issues made and tried in the Court below, and on the evidence before that Court, found against appellee. The parts of Finding No. 8 above referred to were in direct response to the issue thus made.* This appears in *this* Court from the petition and motion for a writ of certiorari filed by appellee in this Court shortly after this case was docketed here. (See their petition for writ of certiorari, pp. 7, 15, 16-17.) In our brief filed in this Court in opposition to their application for the writ of certiorari we said: (p. 12)

> "The inadvisability of leasing to the Cliffs because of possible conflict of interest growing out of its part ownership of the Arctic is set forth in the last paragraph but one on p. 15 of appellee's brief. This idea, while argued by counsel for appellee in both the lower courts, had no evidence to

sustain it. Neither Breitung nor Kaufman assigned that as a reason, but on the contrary claimed they had gone too far with Oliver to consider any one else. (Citing pages of the record in the lower court.) That this alleged conflict of interest had nothing to do with this refusal was further shown by the fact that there was an agreement by Breitung and Kaufman (never in fact carried out) at the very time the Oliver lease was under consideration to lease to the Cliffs other tracts of land in which the Arctic was interested. (Citing pages of the record in the lower court.) Appellee's reference to p. 488 in Exhibit "A" is *not to the testimony*, but the opinion of the District Court, that Breitung and Kaufman while influenced by personal motives were nevertheless justified in their reusal to make a lease to the Cliffs upon the other ground. This finding would have been more appropriate if there had been some evidence on the subject. The Circuit Court of Appeals put Breitung and Kaufman's refusal to make such lease to the Cliffs Company on the only ground shown by the evidence—hostility."

3. The accuracy of our statement that Kaufman and Breitung agreed with the Oliver that if it would buy some of their individual fee at twice its value that they would make the new lease on the property is challenged. We quote from the record.

Certificate No. 14:

"In closing the terms of the lease with the Oliver they (Kaufman and Breitung) insisted as a *condition of making the lease* that the Oliver should buy this Rees one-fourth interest in the fee of this parcel for $131,500.00. The Oliver acquiesced and paid that sum * * *. The price so received by Kaufman and Breitung, $131,500.00, was twice the then fair value of the one-fourth interest purchased, and the Oliver purchased same, not because it otherwise *desired* such interest, but *because it was necessary to make the purchase at this price in order to get the lease from Kaufman and Breitung.*"

4. Criticism of our statement that Kaufman and Breitung were proceeding "separately and independently" is made. By reference to our brief it will be seen that we were presenting the argument that *each side* (with full propriety as we view the legal situation) was *proceeding independently of the other ignoring the Arctic as a legal entity.* Kaufman and Breitung negotiated with the Cliffs in exactly the same way that they negotiated with the Oliver (finding No. 8) representing in both cases their three-quarter interest. In the negotiation with Oliver they so far forgot the Arctic as to demand as a "*condition*" to making any lease at all that the Oliver should buy some of their individual property at twice its value. These facts with the other findings in the certificate, and especially, the finding that "the action of each Arctic faction * * * was inspired by motives of independent interest or feeling aside from interest in the Arctic" (last sentence, finding No. 8) abundantly sustain our position.

5. Under this number (p. 12) counsel for appellee say that Kaufman and Breitung did not know that the Cliffs Company proposed to "cancel its rights" in the existing leases. This statement is repeated in substance in their brief on pp. 41, 43 and 69. On p. 69 appellee goes so far as to assert that the Cliffs and Oliver concealed from Kaufman and Breitung the *existence* of the *traffic contract,* and the pledge of the Queen leases as security therefor, because to have informed them

> "would have been to take the risk that Kaufman and Breitung would discover the use the Cliffs now claims to have made of its pledgee position."

That is to say, if Kaufman and Breitung had known that "the performance of the traffic contract" was likewise secured by the leases they *would naturally have*

expected the Cliffs to demand from the Oliver and receive from it some special contract in connection with any change in its position, and it would be their duty to make inquiry to ascertain the terms of that contract. (Last paragraph their brief, p. 69.) This recognizes the position taken in our original brief. (pp. 45-48.) That they did know all about it was found by the Court below. We quote from the record:

> "As security for payment of the debt and performance of the traffic contract by the Queen it transferred to the Cliffs the four mining leases, and Corrigan transferred to the Cliffs all the stock of the Queen with the right to control the Queen by naming directors * * *. The assignment of the leases to the Cliffs was recorded in Marquette County; and in February, 1898, Kaufman and Breitung were notified in writing by the Cliffs that it had become interested in these leases and desired notice in case the lessor made any change, or in case the lessees made any default." (Finding No. 5.)
>
> "Kaufman and Breitung * * * knew that the Oliver lease could not be made without the Cliffs' consent and for two reasons:
>
> "(1) [They knew] the Cliffs was an equal stockholder in the Arctic and two of the four directors had been selected as representatives of the Cliffs;
>
> "(2) [They knew] the deal for a new lease involved the payment by the Oliver of about $100,000.00 to Corrigan for the interests of the Queen under the existing leases controlled by the Cliffs and the elimination of these leases; [They knew] it required the *consent of the Cliffs to the cancellation of the traffic contract between the Queen and the Cliffs, or the acceptance by the Cliffs of another party in substitution for the Queen in this contract;* and [they knew] it required the consent of the Cliffs to accept payment of the debt due it from the Queen, but which was not due for an average of two years." (Finding No. 8).

The Court then, having found that because of this situation no new lease could be obtained by the Oliver, proceeded (finding No. 9) to find that Corrigan instigated negotiations to be taken up between the Cliffs and the Oliver to see if the Cliffs could not be induced to withdraw its objections to the Oliver lease, and *"to its substitution for existing leases."* The Oliver and the Cliffs having reached an agreement as stated in finding No. 9, the Court finds (see finding No. 10) that Kaufman and Breitung were "directly or indirectly informed and fully understood" that this agreement had been entered into, and *sets forth what it was that Kaufman and Breitung "fully understood."* They "fully understood" that they were at liberty to go ahead and negotiate a lease, and they "fully understood" that when this lease was agreed upon satisfactory to them and the Oliver that "the Cliffs as the controller of the existing leases which blocked the way would consent to their cancellation," and they "fully understood" that the requisite corporate action might be taken to make this new lease effective. That this is the correct construction of finding No. 10 is emphasized by the word "thus" as used in the last line.

Findings Nos. 8, 9 and 10, when read together, are perfectly plain.

We omitted to mention in our original brief that the obligations imposed upon the Regent Company by its assumption of the traffic contract, were necessarily different in their nature from the obligations previously resting upon the Queen. The "traffic contract" obligated the Queen,

> "to give to the Cliffs Railroad the carriage of all ore produced by the Queen mines, at a stated price per ton and until an agreed total had been carried, *including all ore produced by other properties which*

> *the Queen might thereafter control,* and also, the carriage of all its traffic of coal and other supplies in the reverse direction. * * * (Finding No. 5).

The part of this finding underscored by us above was personal in its nature; something which could not, in the nature of things, be performed by the Regent and was entirely lost to the Cliffs when the Queen Company was released from and the Regent accepted as the party to perform that traffic contract.

The power to control the Queen, the debtor in the traffic contract, whereby the Cliffs could enforce specific performance of that contract was also quite a different situation from the position created by its acceptance of the Regent Company in the control of the Oliver. (Findings Nos. 13, 18).

6. The quotation made from our brief and criticised by appellee is practically a quotation of the last sentence of finding No. 8.

As a complete answer to the last sentence on p. 12 of appellee's brief to the effect that Kaufman and Breitung made the arrangement for a sale of their land to the Oliver "openly" and not "secretly,' we quote from finding No. 14:

> "Kaufman and Breitung did not disclose to the Cliffs that they were making this sale in connection with the lease; but the Cliffs learned this fact from the Oliver."

III.

Under the title "The Cliffs is chargeable with the profits derived under the Oliver lease, although no trust rested directly upon it," (brief p. 14) appellees' counsel

have discussed the first question propounded to this Court. They divide this proposition into three subheads for discussion:

(1) A fiduciary duty rested on Mather, director of the Arctic.

(2) Profits arising from disregard of such fiduciary relation may be recovered by the Arctic.

(3) Such profits may be recovered from the Cliffs Company under the facts here involved.

While under the first subhead their proposition is directed concretely at Mather as director in the Arctic, the cases they cite and rely upon are to the effect only that the ordinary director in the ordinary corporation is in a fiduciary relation, a proposition not denied. They ignore entirely (see their brief, pp. 15 to 25) the facts peculiar to this case and distinguishing the Arctic from the ordinary corporation.

Their discussion of the second subhead (pp. 26 to 29) is conducted along the same lines.

In the third subhead above (pp. 29 to 40) appellees' counsel use the word "*profits*," thereby seeking to camouflage the real issue. Their action, as heretofore pointed out, is to recover the contract itself which the Cliffs made with the Oliver, or all the property received and acquired under that contract which is the same thing. Their right "to the profits" arises only if they own the contract or the property itself and is incidental only to the ownership of such property.

In discussing this proposition and the previous two subheads they announce principles and cite authorities which have no application whatever to the facts in this case.

We will start with the assumption set forth in the question itself, that the Cliffs was not itself in a trust

relation to the Arctic Company. How could the Cliffs Company, Mather's independent principal, and itself not in a fiduciary relation, be so affected as to give the Arctic the right to recover the property from the Cliffs. Manifestly, this would result only if the Cliffs Company received such property, which, because of Mather's relation and his part in the transaction, was impressed with a trust in favor of the Arctic—property which equitably belonged to the Arctic when received.

As a matter of law, how does such a situation arise because of directorship duty or the relation and obligations of an agent? As we have shown in our original brief, it does not arise because of the bare violation of duty, or even the fraud of an agent or director. There are many circumstances where violations of duty may lead to the right of rescission, or the right to damages, but where the right to recover property or proceeds thereof would not exist after ratification or affirmance.

In such a case as this, the equitable ownership and consequent right of recovery from the agent or director, or from another receiving with notice, grow out of the law of Agency and the legal identity of the principal and agent in the conduct of the business of the principal. Where the principal acts through an agent, he acts himself. And where an agent acts for his principal in the conduct of the principal's business, or under circumstances where he cannot legally proceed except in behalf of his principal,—everything which the agent contracts for or receives, *belongs to the principal,* and may be recovered. In such a case the principal may ratify and affirm the transaction, and assert his ownership in all that was received by the agent, because, in law, what was done and what was received, was for and in behalf of the principal.

The remedies to be applied in cases of breach of duty by agents or trustees, (whether rescission, damages or accounting), depend upon the facts of each case and must be appropriate to the breach. In every case where a transaction is ratified and affirmed by a principal, the principal's right to impress a trust upon the property received by the agent, (or the third party) and to recover the same, will be found to rest upon the principles of law above set forth.

The foregoing propositions are strongly illustrated and exemplified by the decisions cited in appellees' brief.

In every case cited, where after affirmance by the principal, accounting and recovery were decreed, the decision will be found to rest upon an appropriate state of facts and the propositions of law above announced, namely, that the agent was acting or was required to act in the business and as the representative of the principal, and the property and rights received therefor belonged, in equity, to the principal.

McGourkey vs. Toledo & Ohio Ry., 146 U. S. 536;
Railway Co. vs. Dewey, 14 Mich. 477;
Railway Co. vs. Poor, 59 Me. 277;
Bird Coal & Iron Co. vs. Humes, 157 Pa. 278;
Chandler vs. Bacon, 30 Fed. 538;
Dutton vs. Willner, 52 N. Y. 312;
Zinc Carbonate Co. vs. Bank, 103 Wis. 125;
Wayne Pike Co. vs. Hammons, 27 N. E. 487 (Ind.);
Yale Gas Stove Co. vs. Wilcox, 64 Conn. 101;
Farmers & Merchants Bank of Los Angeles vs. Dowey, 53 Cal. 466;
Parker et al. vs. Nickerson et al., 112 Mass. 195;
Emery vs. Parrott, 107 Mass. 95;
Paducah Land Coal & Iron Co. vs. Hays, 24 S. W. 237;
Paducah etc. vs. Mulholland, 24 S. W. 624.

In other cases cited the principal or corporation might under the facts either rescind or, at its election,

affirm and ratify, and still recover, but rescission or damages was asked and granted.

Lum vs. Clarke, 57 N. W. (Minn.) 662;
Railroad Co. vs. Kelly, 77 Ill. 426;
People vs. Board of Overseers, 11 Mich. 222;
Boston vs. Simmons, 150 Mass. 461;
Rutland Electric Light Co. vs. Bates, 68 Vt. 579;
Cumberland Coal & Iron Co. vs. Sherman et al., 30 Barb. 553;
Hoffman Coal Co. vs. Cumberland Coal Co., 16 Md. 556.

In many of the cases, however, violations were complained of which could lead only to the right of rescission or damages, and the remedy of rescission or damages was granted.

Wardell vs. Union Pacific R. R. Co., 103 U. S. 651;
Woodstock Iron Co. vs. Richmond & Danville Extension Co., 129 U. S. 643;
Elliott vs. Baker, 194 Mass. 518;
West vs. Camden, 135 U. S. 507;
Boston vs. Simmons, 150 Mass. 461.

The principle of "public policy" so frequently quoted in appellees' brief, namely: that an agent or trustee will not be allowed to make profit out of his agency or trust, has never been disputed. While prohibitive to the agent, this general principle does not at all determine the rights or remedies which may be asserted or asked for by the principal. It is as applicable and as frequently stated in cases where rescission or damages are the only remedies warranted, as where accounting and recovery of property is asked for and granted.

Under the principles of law above announced, the real question here for determination may be stated as follows: *Did Mr. Mather as director of the Arctic Iron Company, while engaged in its business, or under circumstances where he should and was bound to act for it,*

enter into and obtain the contract with the Oliver Company here in question so that such contract (or the property received thereunder) *in equity, belonged to the Arctic Company and was impressed with a trust for it?*

The appellees recognize that the answer to this question depends upon the principles above set forth, not in so many words, but in their claims, the effect of their argument and the authorities relied on; and they seek to establish a situation necessary to a recovery. To accomplish this, they make two claims:

1. That the contract with the Oliver Company was negotiated by William G. Mather, as director of the Arctic Company, while acting in and conducting the business of that company and that he wrongfully and fraudulently demanded and exacted the contract in question *as a bribe and consideration for his agreement to vote as such director for a new mining lease to be later entered into by the Arctic Company.*

That our analysis of the position of appellee's counsel is correct appears from the claims and statements found in their brief, from which we quote: On p. 36 of appellees' brief, it is said:

> "It is argued in this connection that Mather was not acting for the Arctic in his dealing with the Oliver, and that his dealing was with the consent of all parties. The facts do not bear out the proposition."

And also on the same page:

> "The consideration moving to the Cliffs—that is the one-quarter of the ore mined under the new lease at cost—was plainly the result of Mather's consent to the Arctic's making any lease at all to the Oliver. The abrogation of the then outstanding leases was a mere incident to that consent."

And also on pp. 36 and 37:

> "The Cliffs was to get one-quarter of the ore taken from land belonging to the Arctic as the fruits of the secret bargain. It was to get it as the result of the conduct of Mather, who, as a director of the Arctic, was agreeing that that company should make the lease, and at the same time was bargaining with the Oliver for one-fourth of the profits made from the Arctic's land. The bargain could be carried through only if Mather as a director and officer of the Arctic Company acted and voted so as to enable the lease to be made."

The same idea is set forth at the bottom of page 42. Thus the appellees' counsel squarely plant themselves upon the proposition that the one-quarter of the ore, was a bribe pure and simple exacted by Mather as a *director of the Arctic* in consideration of his vote for the new lease.

The claim so made has the merit at least of being consistent with the nature of the suit brought. The difficulty is that it has no basis in the facts certified to this Court. Indeed, it is flatly in the face of the facts as so found.

If the quarter of the ore to be mined under the new lease "was plainly the result of Mather's consent to the Arctic's making any lease at all to the Oliver as asserted by the appellee above--in other words was a bribe—Mather's conduct would have been *intentionally dishonest.*" He would have been guilty of *actual* fraud and the Circuit Court of Appeals must have so found. But this claim is untenable, since the court below found and certified: (Finding No. 15)

> "Mather neither expected nor received any personal benefit whatever from any of the transactions herein recited."

(Finding No. 16):

> "Mather exercised no influence or efforts to bring about the making of the lease to the Oliver, nor did he in any way mislead, deceive or defraud Kaufman and Breitung in the subject matter—unless such misleading or fraud are to be inferred as a matter of law from his directorship in the Arctic, and his keeping from his fellow directors knowledge that the Cliffs was acquiring an interest."

And final paragraph (Rec. p. 10):

> "Since we are of the opinion that there was no fraud or misleading or breach of directorship duty by Mather, unless the same arose wholly as matter of law and as a presumption of law from the relations of the parties herein set out, the question so presented has seemed to us proper for certifying to the Supreme Court."

Appellees' counsel seem, however, to be in some doubt whether the Cliffs received this ore (or interest in the lease) through the alleged wrongful act of Mather as an officer of the Arctic, or whether the Cliffs received it through the alleged wrongful act of its own agent Mather through and because of his representative position as a director of the Arctic. Thus, on p. 39, they say:

> "The Cliffs wanted the entire new lease itself. Failing in this it was content with one-quarter of the fruits of the new lease. This accomplished it was ready to do everything necessary to cancel the old and create the new leases. (Finding No. 10). The surrender of the old leases was not, and the secret arrangement for an interest in the new lease plainly was the consideration which induced the Cliffs no longer to block the proposed lease with the Oliver."

But this position is equally untenable, for here, as in the other case, what the Cliffs received would not be the property of the Arctic unless secured by the Cliffs as a bonus without consideration by means of the wrongful act of its own agent. But there was no bonus.

The Cliffs canceled and surrendered valuable and substantial independent rights in which the Arctic Company had no interest whatever, and, therefore, paid a proper consideration for what it got.

Thus, under the facts as certified, no room exists for the claim of bribery, or that there was any actual dishonesty or fraud practiced by Mr. Mather or the Cliffs, or that there was in fact any bonus given to anybody.

In this connection we wish to call attention to the confusion of ideas embodied in the quotation above from pp. 36-37 of appellees' brief, wherein they say:

> "The Cliffs was to get one-quarter of the ore taken from land belonging to the Arctic."

The Arctic owned only a half interest in the land leased, and the one-quarter of the ore which the Cliffs received came out of the land covered by such lease. The Arctic is not seeking here to recover ore taken out of its land, and which previously belonged to it. It might have brought this kind of a suit, had it elected to have rescission of the lease. The suit is to recover, as we have several times pointed out, the contract that the Cliffs secured from the Oliver, or the property which the Cliffs received under and by virtue of that contract, which is the same thing.

2. The second claim of appellees' counsel is that it was the duty of Mather as director of the Arctic to disclose the considerations and interests which the Cliffs was to receive under its agreement with the Oliver Company; but that he and the Cliffs Company wrongfully concealed such facts, in violation of his duty as such director,—by reason of which concealment the Arctic Company may now demand from the Cliffs such entire considerations and all subsequent profits made therefrom. We quote from their brief. On page 36 they say:

"The other officers of the Arctic knew nothing of his dealings with the Oliver, and were carefully kept from knowing anything of them. They merely learned in February, 1899, that he had withdrawn his expressed opposition to the lease. They did not know why nor had they means of knowing. He took care that they should not know he had been dealing with what his counsel now call the independent rights of the Cliffs in which the Arctic had no interest."

Also on page 37:

"The bargain could be carried through only if Mather as director and officer of the Arctic acted and voted so as to enable the lease to be made."

Also:

"It is not open to appellants to say that the interest in the lease is not a matter before the court; that is to say, the profits which resulted to the Cliffs from the secret bargain negotiated by its president, who was also an Arctic director with the Oliver for the benefit of his independent principal, the Cliffs."

Also:

"The breach of Mather's trusteeship duty is what is complained of. The profits flowing to appellants because of that breach are what are sought, whatever form they take."

The extent and purpose of the concealment is shown by the Certificate. There was no concealment of the fact that the Cliffs Company had reached an agreement with the Oliver Company. This was known and fully understood by Kaufman and Breitung (Certificate, Sec. 12). The only fact which was not disclosed was that the Cliffs was to receive from the Oliver the right to take one-quarter of the ore as the consideration for its agreements with the Oliver. (Certificate, Sec. 11).

The failure to disclose was not for the purpose of injuring the Arctic, or of gaining rights which should have belonged to it. There was no dishonesty or inten-

tional fraud. The Cliffs interest in the new lease caused no loss to the Arctic Company, but a real benefit. (Certificate, Sec. 17). The failure to disclose was plainly occasioned by the unreasonable personal hostility of Kaufman and Breitung toward Mather, which they would have allowed to interfere with the transaction. (Certificate, Sections 8 and 11).

The legal results of the failure to make disclosure and the concealment may be determined by the application of elementary principles.

Assuming that the concealment here complained of was a violation of Mr. Mather's directorship duty,—then the Arctic might, at its election, rescind the transaction. But how does such concealment of itself give to the Arctic the property now claimed by the appellees under the facts shown by the Certificate?

Wrongful concealment by an agent does not of itself confer upon the principal property rights which he would not otherwise have had. It simply prevents the agent, or third parties with knowledge, from wrongfully acquiring property rights. The result of concealment is to open the transaction in question, and to relate it back as of the beginning,—giving to the principal the right to elect whether he will rescind and refuse to enter into it, or whether he will ratify and affirm it.

If the principal elects to rescind he must undo the transaction and restore all property received. If he elects to ratify and keep the transaction, his ratification relates back to the beginning. He can then only demand the property rights and interests which in equity belonged to him, and which he could have demanded from the beginning, had full disclosure been made.

The findings of fact are clear and definite, that the Oliver's negotiation with the Cliffs related to an agree-

ment whereby the independent rights of the Cliffs, which controlled and prevented any new lease, should be canceled. (Findings Nos. 5, 8, 9, 13, 18). Neither the Arctic nor any director acting for it could lawfully have dealt with or disposed of these independent rights. Had Mr. Mather, as a director of the Arctic, attempted to do this for the benefit of the Arctic, both he and it would have been liable to the Cliffs. It would, therefore, have been impossible for Mr. Mather, acting for the Arctic, to secure for it the right to take this one-quarter of the ore (one-quarter interest in the lease). The Arctic did not have and could not give the considerations required by the Oliver. (Certificate No. 17). Neither would Mather have been allowed to make such a contract for the Arctic with the obligations attached thereto, even if he could have lawfully done so. (Certificate No. 17).

For all the foregoing reasons the claim of appellees' counsel, that because of the failure to disclose or concealment the property and the profits thereof held by the Cliffs were in law held in trust for the Arctic and may be now demanded, is without foundation.

But there are other considerations which lead to the same conclusion. Had full disclosure been made in advance Kaufman and Breitung and the Arctic would have been compelled to then elect to recognize the Cliffs' contract with the Oliver, and permit the Cliffs to receive the considerations from the Oliver therein agreed upon, or else refuse to make the lease. This is because of the separate and independent rights of the Cliffs, which had to be canceled before any new lease could be made. This fact distinguishes this case from all the cases cited by appellees' counsel. Rescission in 1904 would put the Arctic back where it was in 1899. It can no more affirm the lease in 1904 and confiscate the independent rights of the Cliffs

than it could have insisted in 1899 on completing the lease and appropriating at that time the considerations parted with by the Cliffs when it closed the contract with Oliver.

IV.

RESCISSION.

Appellee's counsel on pp. 43 and 44 misstate our position entirely. They also misstate the facts and misinterpret the cases cited by us (our brief p. 23). In all these cases the party alleged to be a fiduciary, or to be in a position involving such responsibilities canceled or parted with independent rights without which the contract the principal desired could not have been made. In connection with the making of the principal's contract in those cases, the same as here, there occurred an alleged breach of duty.

Furthermore, in our case the principal (the Arctic) was not in the least damaged by such alleged breach of duty. The lease itself was enhanced in value by the Cliffs becoming a part owner thereof. (Finding No. 17). After full discovery the Arctic decided to keep this lease which could not have been obtained except through the cancellation of the Cliffs' independent rights.

It is a matter of no consequence that the independent rights of the Cliffs were released as the result of a contract with Oliver, rather than with the Arctic. The lease itself depended upon the cancellation of such rights and it cannot be retained and a recovery in this case permitted except by a confiscation of those rights of the Cliffs as in the cases cited in our original brief. The principle is the same.

The mere fact that the Cliffs' contract turned out to be a very profitable one rather than a losing venture does not change the legal situation. It might easily have been disastrous. *It involved large risks that Kaufman and Breitung who knew all about such matters would not take for themselves nor permit the Arctic to take.* (Findings Nos. 13, 17 and 18).

Bristol vs. Scranton, (57 Fed. 70; 63 Fed. 218) while somewhat different in its facts is in principle exactly like the case at bar. The differences and the similarities are easily seen. If anything, the equities in our case are the stronger. The Scrantons negotiated the consolidation; Mather and Hayden took *no* part whatever in the negotiations of the new lease. Before the consolidation could be made, it was necessary that the Scrantons forego a personal right, to wit, agree not to go into a rival business for ten years; before the Oliver lease could be closed it was necessary that the Cliffs should cancel and surrender its rights in the existing leases. *In fact, the Cliffs was actually threatened by Kaufman and Breitung with litigation if they did not give up these rights and allow Kaufman and Breitung to make the lease that they had already promised,* and in which they had a stipulation for private gain of $65,000.00. Both the consolidation in the Scranton case and the lease in our case were found to be good contracts both for the corporation and the stockholders. The Scranton Company was composed of many stockholders and the two Scrantons as directors and officers represented this large body of stockholders; the Arctic consisted only really of two stockholders, and Mather and Hayden were elected as the special representatives of the Cliffs' interests and Kaufman and Breitung were there representing themselves. In neither case was there intentional wrong-doing—fraud

in fact—but at most a constructive fraud growing out of the alleged legal relation.

On p. 52 appellee makes the following statement:

> "Again: By turning in some of his own property with the property of his beneficiary, a trustee does not avoid liability to account for the profits arising to him out of his transactions with his beneficiary's property."

The same idea is repeated near the top of p. 74 of appellee's brief and perhaps elsewhere. It shows a total misunderstanding of the real issues involved in this case. There is here no mixing of the property of the agent with the property of the principal. This suit is not brought to recover property *previously belonging* to the Arctic, but property *alleged* to belong to the Arctic *because acquired by the Cliffs under such circumstances as to make it the property of the Arctic.* The plaintiff's right is no better nor worse than it would be if Oliver had conveyed to the Cliffs a piece of land in New York City or paid the Cliffs a sum of money as a consideration for what the Cliffs did in this case. Had the Arctic rescinded the contract of lease (assuming that it had that right) it could on an accounting incident to such rescission recover its own ore (or the value thereof) taken by both the Oliver and the Cliffs. (See our original brief p. 37).

The considerations submitted under Nos. (7) and (8) on pp. 53 and 54 of appellee's brief are entirely outside of any facts certified or questions submitted to this court.

V.

UNCLEAN HANDS.

Appellee's counsel in discussing this question misunderstand our position.

Kaufman & Breitung brought this suit as stockholders. (See our original brief pp. 37, etc.) While such a suit is in a sense one in the right of the corporation, equity is not so blind that it cannot see that a recovery herein (there being no income except royalties and no corporate debts, finding No. 1) is solely for the benefit of the natural persons Kaufman and Breitung. The position of the defendant Cliffs (the only stockholder except Kaufman and Breitung) in paying a 100% decree and getting back 50% thereof by way of dividends on the stock in the Arctic, is not distinguishable from the payment of a 50% decree direct to Kaufman and Breitung.

The wrong that Kaufman and Breitung were guilty of was this: In negotiating this lease they put their duty to the Arctic and their self interest in conflict when they *required* the Oliver to buy some of *their own property as a condition* to getting the lease. The price they demanded (twice what the property was worth) is important only as showing their animus and the fact that they were actually benefited by the improper use of their position. They were not even satisfied to sell their own property at what it was worth. If in connection with making the lease for the Arctic they could force the Oliver to buy individual property (which the Oliver did not want) at $65,750.00 more than it was worth, why could they not have secured this sum as a bonus for the Arctic? This, of course, explains why (in addition to their hostility) they insisted on leasing to Oliver.

On p. 52 of appellee's brief, appellee quotes for the purpose of showing the diligence and faithfulness of Kaufman and Breitung from finding No. 12 as follows:

> "Kaufman and Breitung insisted upon many concessions and in the end procured the best terms in all respects for the Arctic that could have been procured from the Oliver or any one."

Omitting therefrom the significant qualification of this finding contained in the following words:

> "except as the fact that the Cliffs was willing to offer better terms and other facts herein specifically found may affect this conclusion."

They quote from Finding No. 8 as follows:

> "At the time good business judgment dictated the acceptance by the Arctic of the proposed new lease on the terms offered by the Oliver,"

omitting the qualification immediately following:

> "and of course on the better terms offered by the Cliffs,"

this being followed by the further finding that *they* were

> "inspired by motives of independent interest or feeling aside from interest in the Arctic."

The argument presented by appellee (pp. 58-61) that the equal division of the Arctic stock and directorate was a good reason why Kaufman and Breitung did not lease to the Cliffs we have already discussed. We will only add that the finding of the Court below does not leave this question open for discussion. Its conclusion from the evidence was as follows:

> "Each offering company, the Cliffs and the Oliver, was of the highest standing, both financially and for integrity, and fairness and for skill in mining, and save for the terms which might be offered there was *no* reason for preferring one to the other as lessee." (Finding No. 8).

The rule that the wrong which will repel a plaintiff from a court of equity is not general immoral conduct, but must be connected with the subject matter or transaction in question, is established by all the cases. If we take the facts as found by the Court against Kaufman and Breitung and the complaint as made against the Cliffs and Mather as true the parties are in *pari delicto* in respect to the same transaction. Kaufman and Breitung as officers and directors of the Arctic consented to its making a lease on condition that they secure a personal advantage in the sale of their individual property. The complaint made against the defendants is that they took a similar advantage of their position. Are Kaufman and Breitung in a position to complain that the acts of the defendant were a violation of duty to the Arctic when they were themselves doing the same thing in connection with that same lease?

VI.

THE DUTY OF KAUFMAN AND BREITUNG TO MAKE INQUIRY.

Appellee's counsel on pp. 68, etc., discuss the above subject. This argument is based upon an entirely wrong assumption. Kaufman and Breitung knew all about the independent rights held by the Cliffs.

We have already answered the comments of counsel found on p. 69.

The argument presented on pp. 70 and 71 may be answered by the fact that the Cliffs was willing to meet any offer made by the Oliver and *give a substantial bonus besides*. Kaufman and Breitung knew of the existence of these independent rights; they knew that those rights

had been settled for and they knew that in connection therewith the Cliffs had agreed to allow to be approved by formal corporate action any lease upon the property that Longman and Breitung wanted to make with Oliver. It is idle to discuss that any man of any sense would not have known from this that the Cliffs had received what to it was satisfactory compensation for its existing rights.

Peruvian Silver Mining Company vs. Grant, 11 L. R. Chan. Div. 918, and *Liquidators, etc. vs. Coleman*, L. R. 6, House of Lords 189, are cited by appellee (their brief p. 71) on the duty of a fiduciary to make disclosure. The fiduciary in both of those cases secured by a concealment certain commissions *which were a part of the very price of the property of the principal and which he could as well have secured for his principal.* These cases involve an application of the principles heretofore pointed out to a state of facts entirely different from the facts in the case at bar.

VII.

Under the title, "Mather's duty was to disclose the Cliffs' interest in the proposed lease," appellees' counsel discuss Questions 4-a and 4-b. After quoting these two questions correctly they say: (brief p. 75)

> "In view of the way in which the *stock* of the Arctic was owned, did Mather, director and officer of the Arctic, owe it a duty to disclose to it that by reason of his secret bargain the Cliffs was to have a lessee interest in the proposed lease, or was his duty performed if he left it to the other directors of the Arctic to say what the terms of the lease should be after he had made his bargain with the Oliver.

"Such seems to be the gist of the questions which it would appear may properly be discussed together and not separately."

Appellees' counsel thereupon proceed to consider Questions 4-a and 4-b at length on the theory that by "existing make-up" and "the existing relations" of the stockholders the Court below referred to *mere stock ownership.*

This is an erroneous interpretation of these questions and ignores entirely the real status of the Arctic, the purpose for which it was created and the use made of it and the real relation of the stockholders to each other and the corporation which the court below took pains to certify at great length.

By "*existing make-up of the Arctic,*" the Court refers to a corporation organized and made up as it is certified the Arctic was, and used, regarded and dealt with as under the findings. The Arctic was regarded by its two stockholding interests as the instrument or incorporated agency to hold the title to property, which was to be dealt with as the stockholders should agree. (Certificate, Sec. 1.)

By the "*existing relations of the two bodies of stockholders to each other and to the Arctic,*" the court below refers to the facts as certified, namely, where each side owned outside independent interests and property rights connected with and affecting the mineral property in question held by the Arctic Company,—but in which outside interests neither the Arctic nor the other side had any share or right, and each side also owned one-half of the stock of the Arctic; where each body of stockholders had chosen two directors to preserve the exact balance of power between the two interests, and where none of the directors were authorized to or could act in

representation of the company or in the transaction of any business except with the consent of all.

Between themselves the two bodies of stockholders were equally skilled and experienced (Certificate, Sec. 16), and each side dealt at arm's length with the other, each representing and dealing with its share of the property in connection with its independent interests, or inspired by separate motives aside from the Arctic. Their earlier dealings are described in Section 1 of the Certificate; and we have shown in our original brief that in their relation to each other, each of the two interests had in the transaction here in question, by acquiescence and agreement, proceeded to deal with the Oliver Company separately and independently of the other,—each with reference to its own independent property and rights, with the understanding that they would treat the Arctic as their instrumentality and cause it to execute any lease which Breitung and Kaufman should agree to make; under which arrangement both sides actually went forward independently, each without consultation with the other, and the transaction was carried out, each parting with its independent property;—by reason of which, in their relation to each other, each stockholding interest should be estopped to complain or assert rights on the ground that they thus proceeded or that the Arctic was so treated as an instrumentality for holding their title.

In view of such "*existing make-up of the Arctic*," and such "*relations*,"—the court below has requested instruction as to the status of *such* a corporation, and as to the duties of Mather as a member of *such* a board of directors toward the Breitung and Kaufman interests; and by Question 5 it requests instruction on a like basis as to the duties of the Cliffs Company toward Breitung and Kaufman.

The appellees in their discussion of this subject have not touched these questions. The propositions of law found in their brief with the authorities supporting the same (Brief, pp. 75-93) have no bearing upon or relation to the subject thus before the court.

On the theory that these questions deal with the ordinary corporation and the fact only that the *stock* was *equally* divided they go forward with their entire discussion treating the Arctic Iron Company as the ordinary business corporation engaged in business in the normal way, having the usual stockholders and having a Board of Directors chosen and empowered as in the ordinary corporation. On this supposition they cite and quote from numerous decisions and state principles of law which nobody contraverts, but which are inapplicable to the instant case for the reasons pointed out in the first part of this brief.

In our original brief (pp. 48 to 50) we stated what is clearly the law that the fiduciary character of a director and officer of a corporation grows out of his agency relation—the power of management and control vested in him by virtue of his office. Manifestly, in view of this "make-up of the Arctic," and in view of "the relations of the stockholders," Mather was not a manager, or in any sense vested by the stockholders of the Arctic with the right to exercise discretion and judgment or to act for the corporation. He was a director of the Arctic only as agent for the Cliffs. His relation to Kaufman and Breitung or to the Arctic Company, in view of the peculiar facts certified, had no fiduciary character. The mere failure to disclose, therefore, was not a violation of duty because such violation could arise only if a real fiduciary relation

Question 4-b suggests a further idea growing out of the fact that Mather was a director of the Arctic as the

special representative of the Cliffs, and whether what was done did not, under the circumstances, satisfy any obligation which could be said to have rested upon him as such "representative" director. Question 5-a embodies in a broader way the same idea.

Both questions call for a broad review of the equity of the whole situation since the Cliffs itself, a stockholder only, may be considered as holding a position analogous to Mather's because of Mather's representative character. These questions cannot be answered by a consideration only of the fiduciary relation of a director in a technical sense, but only by a consideration of all the facts surrounding this transaction. For authorities bearing upon this question and discussion of the question, see our original brief pp. 57-62, 63-66.

If the Arctic had in fact obtained a poor lease, or if Kaufman and Breitung had been ignorant of the business of making leases and had been imposed upon in any way by Oliver, or if, although competent to make a lease, they had been influenced by Mr. Mather, the equities at least would have been different. But all these facts are to the direct contrary. The Arctic lease was a good lease and the Cliffs participation therein jointly with the Oliver enhanced its value. Kaufman and Breitung were thoroughly competent, in fact as competent as Mather, to determine what was a proper lease. Mather in no way influenced the making of this lease.

Furthermore, these other significant facts are found. Kaufman and Breitung would not have taken this quarter interest in the lease which the Cliffs secured, had it been offered to them, and they would not have permitted the Arctic to take it. In addition to this fact they had an agreement to sell some individual property at $65,000.00 more than it was worth. These are not inferences, but

actual facts, found. The questions must be answered in view of this extraordinary situation.

The answer to Question 4-b when regard is had to the fact that Mather was the special representative of the Cliffs, is therefore, clear. Any duty which rested upon him, in view of the relations of the two bodies of stockholders, was satisfied so long as Mather did nothing to promote the lease and left it wholly to Kaufman and Breitung.

The answer to Question 5-a is equally clear. Both Mather and the Cliffs performed every duty which rested upon either of them when, under all the circumstances, the Cliffs having made its bargain with the Oliver, by which the Cliffs was to surrender its independent rights, both Mather and the Cliffs withdrew from all participation in the matter and notified Kaufman and Breitung to go ahead and make any lease they wanted, and that the Cliffs "would acquiesce therein."

The answer to Question 6-a ~~is equally clear~~. 6-b manifestly depend upon the same principles of law which we have just discussed.

We might add that Question 5-b presents a slightly different aspect and involves the right or duty of Mather, as a director in the Arctic, to use information which came to him as an officer of the Cliffs. If the Arctic was the ordinary corporation, it would clearly have no right to the benefit of the information which came to Mather as an officer of the Cliffs. Kaufman and Breitung's knowledge that Mather, a director of the Arctic, was also a director and officer of the Cliffs, and as such officer of the Cliffs was negotiating with the Oliver with respect to the independent rights of the Cliffs, would operate as a consent that he might act in that capacity. Knowledge acquired under such circumtances was not the property

of and could not legitimately be used for the benefit of the Arctic.

This is not, however, in our opinion the real situation. Mather was a Director of the Arctic only as the "representative" of the Cliffs, and in our opinion owed no different duty to the Arctic than the Cliffs itself. The Arctic Company was nothing but a business convenience, an incorporated instrumentality or agency for the natural persons who previous to its incorporation owned this property, and whose sole purpose in organizing the company was to preserve the previous existing relations. They were not partners, but tenants in common, and not in a fiduciary relation before they organized the Arctic and conveyed the title to it, (Clark vs. Sidway, 142 U. S. 682-690) and their only purpose in creating the Arctic was to preserve existing relations. They actually used this corporation in this way and in no other as appears from the certified facts. In fact to all intents and purposes the Arctic is to be treated as a Trustee to hold this title.

In our original brief, pp. 48 to 66, we discussed and cited many authorities to the point that the Court would look through the legal entity of the Arctic Iron Company and see the real parties in interest, and if we are right in the position we there took, that ends this case.

The status of corporations with a make-up similar to the Arctic Iron Company has been passed upon by this Court in a few cases, two of which were decided since our original brief was filed herein.

United States vs. Delaware, Lackawanna & Westcare Ry. Co. 238 U. S. 516; see opinion 529, 530;

Southern Pacific Co. vs. Lowe, Collector, 247 U. S. 330. (Decided June 3, 1918.)

Chicago, Milwaukee & St. Paul Ry. Co. vs. Minneapolis Civic and Commerce Commission, 247 U. S. 490; (decided June 10, 1918.)

In *Chicago, Milwaukee & St. Paul Ry. Co. vs. Minneapolis Civic and Commerce Commission*, Mr. Justice Clarke in the opinion on page 500, 501 said:

> "Much emphasis is laid upon statements made in various decisions of this court that ownership, alone, of capital stock in one corporation by another, does not create an identity of corporate interest between the two companies, or render the stockholding company the owner of the property of the other, or create the relation of principal and agent or representative between the two; (citing many authorities) and it is argued that since the order of the Commission requires that the tracks, the title to which is in the Eastern Company, be treated as the property of the stock owning companies, the effect of it, if enforced, will be to deprive the Eastern Company of its property without compensation and to render valueless its capital stock owned by the Milwaukee and Omaha companies.
>
> "While the statements of the law thus relied upon are satisfactory in the connection in which they were used, they have been plainly and repeatedly held not applicable where stock ownership has been resorted to, not for the purpose of *participating in the affairs of a corporation in the normal and usual manner*, but for the purpose, as in this case, of controlling a subsidiary company so that it may be used as a mere agency or instrumentality of the owning company or companies, *United States v. Lehigh Valley R. R. Co.*, 220 U. S. 257, 273, and *United States v. D. L. & W. R. R. Co.*, 238 U. S. 516. In such a case the courts will not permit themselves to be blinded or deceived by mere forms of law but, regardless of fictions, will deal with the substance of the transaction involved as if the corporate agency did not exist and as the justice of the case may require."

It will not be denied that the two stockholders in interest (no creditors or other stockholders existing) could give to the Arctic Company or its directors, such status and power as they should agree upon and determine. No

particular form of agreement is necessary to accomplish this; such an agreement may be found in the articles of incorporation, as well as the course of conduct of the parties in interest, or the plan as disclosed by the evidence.

United States vs. Delaware, Lackawana & Western Ry. Co., supra.
Beardsley vs. Beardsley, 138 U. S. 266, 270.

In the case at bar the court below has found the "purpose" for which the two parties in interest caused the Arctic Company to be incorporated; they have found the plan adopted by these two parties to make that purpose effective; they have found that the original purpose continued down to the end. The legal result, therefore, is clear. It was not the ordinary business corporation. There attached to the nominal director none of those duties and obligations ordinarily attaching to a director. The parties were in effect tenants in common. No fiduciary relation in fact existed and there was no violation of any duty.

CONCLUSION.

If, however, this Court should be of the opinion under the facts as certified, that a technical fiduciary relation existed, and that the duties attending that relation were violated, and that our contention as to the effect of such violation is unsound; and the Court should be further of the opinion that our position as to unclean hands and estoppel is incorrect, nevertheless there could be no recovery here, as the *only remedy open to the Arctic after ratification with full knowledge is rescission.*

Equity will not permit the Arctic to confiscate the property rights of the Cliffs Company, parted with when it consummated the contract with the Oliver Company. Especially should this principle, so well fortified by the authorities, be here re-affirmed in view of the clear equities of the whole situation, as embodied in the facts as certified.

Respectfully submitted,

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Solicitors for
The Cleveland-Cliffs Iron Company
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IN THE

Supreme Court of the United States

October Term, 1917.

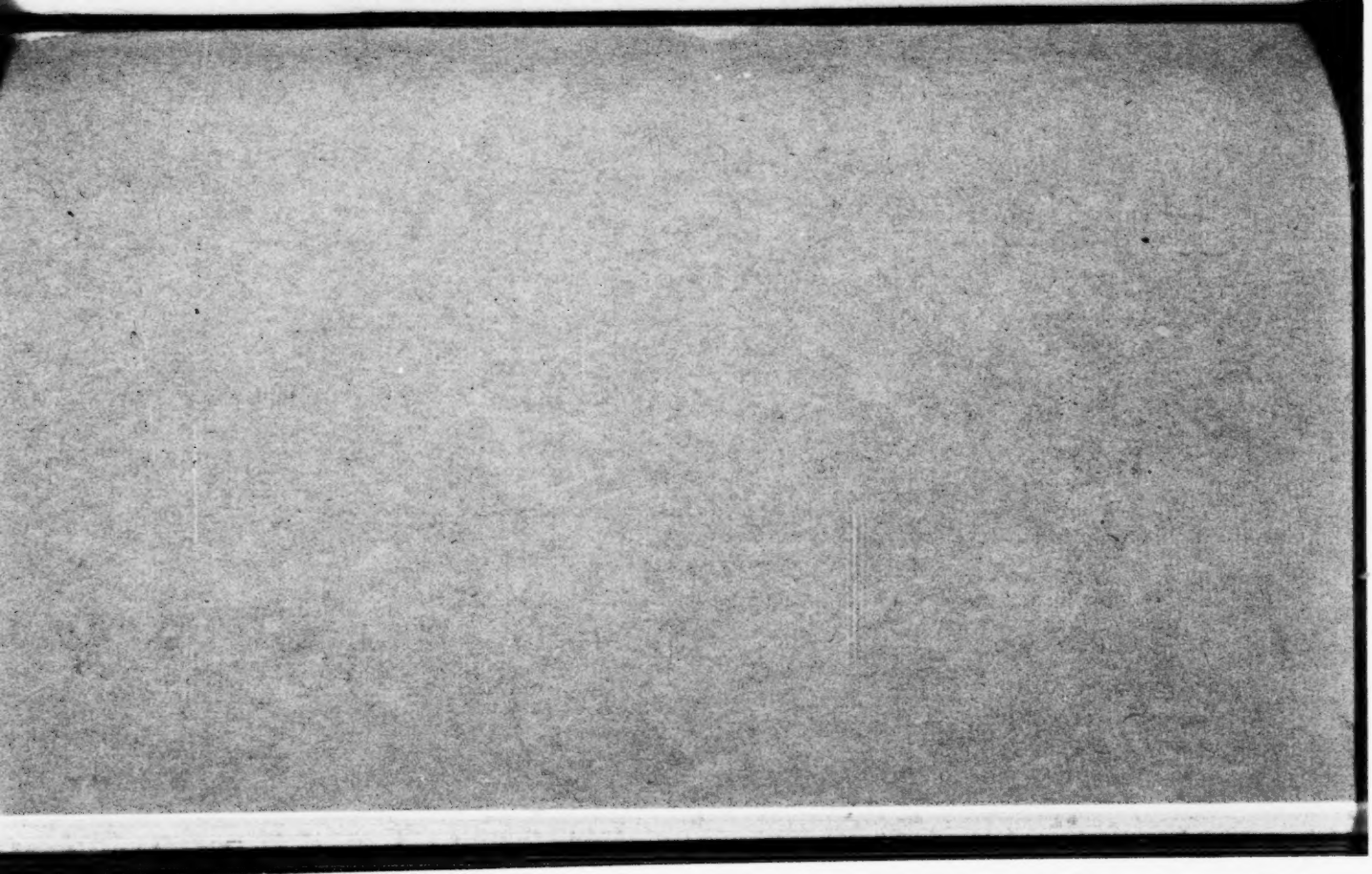
No. [redacted]75

CLEVELAND CLIFFS IRON COMPANY, and
WILLIAM G. MATHER,
v.
THE ARCTIC IRON COMPANY.

On Certificate From United States Circuit Court of Appeals
For the Sixth Circuit.

BRIEF ON BEHALF OF THE ARCTIC IRON COMPANY.

S. W. Shaull,
A. C. Angell,
Solicitors for
Arctic Iron Company.



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IN THE

Supreme Court of the United States

October Term, 1917.

No. 324.

CLEVELAND CLIFFS IRON COMPANY, and
WILLIAM G. MATHER,
v.
THE ARCTIC IRON COMPANY.

On Certificate From United States Circuit Court of Appeals For the Sixth Circuit.

BRIEF ON BEHALF OF THE ARCTIC IRON COMPANY.

In 1904, the Arctic Iron Company filed a bill against the Cleveland Cliffs Iron Company and William G. Mather, in the circuit court for the County of Marquette, Michigan. The case was duly removed by the defendants to the circuit court of the United States for the western district of Michigan, northern division. After hearing on the merits in that court, a decree was entered in behalf of the plaintiff that the defendants should account for the profits derived by the defendant, Cleveland Cliffs Company, out of a secret bargain made with the Oliver Iron Company by the Cliffs Company, acting through the defendant, Mather, who was, at

NOTE: The italics and bold faced type used in quotation from cases in this brief are ours.

the time of the making of the bargain, a director and secretary of the Arctic Iron Company.

An accounting was afterwards had before a master. Upon the filing of his report, the defendants re-argued, before the then district judge, not only certain exceptions to the report, but also in effect re-argued the legal questions involved in the case.

After consideration, the court fully sustained the position laid down by the opinion rendered after the hearing upon the merits, and entered a decree in favor of the plaintiff for substantially $900,000.

The defendants appealed from this decree to the circuit court of appeals. The appeal was fully argued in that court, and that court has certified to this court the questions of law set out in its certificate of November 14th, 1916.

Shortly after the filing of this certificate the Arctic Iron Company moved here for a writ of certiorari, in order that this court might have before it the record, and exercise its own judgment upon the facts appearing therein. This course was pursued, as appears from the motion papers, because the Arctic Iron Company thought that some of the conclusions of fact stated in the certificate were unwarranted by the record. This court, however, denied the motion for certiorari.

OUTLINE OF THE CASE.

The circuit court of appeals in its findings, numbered 1 to 18, both inclusive, has stated what it finds to be the facts in the controversy.

The facts are complicated.

We believe it will be of assistance to this court if, at the outset of this brief, we present an outline of the facts found by the lower court.

In 1883 the Arctic Iron Company was organized as a corporation under the laws of Michigan with reference to mining companies. Edward Breitung and his wife, and William P. Healy and his wife, were the incorporators. Half of the stock of the company was taken by Mr. and Mrs. Breitung and half by Mr. and Mrs. Healy. The capital stock was paid by the transfer to the company of an undivided one-half interest in a tract of mineral land. Mr. Breitung owned, individually, the other undivided half of this tract of land. Mr. Breitung died about 1886. His interest in the stock of the Arctic Company and in the half of the land above spoken of, passed to his son, Edward N. Breitung, and his widow, who afterwards became Mrs. Kaufman.

On November 30th, 1898, the stock of the Arctic Company owned by Mr. and Mrs. Healy was acquired by the Cleveland Cliffs Company. One share of this stock was reissued to defendant Mather, one share to George Hayden, the attorney for the Cliffs Company, and the remainder to defendant Mather, as trustee for the Cliffs Company.

On December 30th, 1898, at a stockholders' meeting of the Arctic Company, Mrs. Kaufman, Mr. Breitung, Mr. Mather and Mr. Hayden were unanimously chosen directors of the Arctic Company; Mrs. Kaufman was made president and Mr. Mather, secretary.

The Cleveland Cliffs Iron Company (hereinafter referred to as the "Cliffs") was a West Virginia corporation, having its principal offices at Cleveland, Ohio, and Ishpeming, Michigan. Defendant Mather was its president and treasurer. He and his immediate relatives held about 5 per cent of the entire capital stock of the Cliffs Company.

The Oliver Iron Mining Company (hereinafter spoken of as the "Oliver" was a corporation with its principal office in Pittsburgh, Pennsylvania, engaged in iron mining. It was, in the autumn of 1898, the operating branch of the Carnegie Steel Company. It and the Cliffs Company were the chief operators of iron mines in the Marquette district.

Between 1886 and 1889, the Arctic Company, as owner of half of the fee, and Kaufman and Breitung, owners of the other half, had executed certain leases for twenty years covering parcels of property owned jointly by the lessors, and, in the case of two parcels, partly owned also by certain other persons. Somewhat later, the lessees' interests under these leases had become vested in two corporations, the Queen Company and the Blue Company (hereinafter mentioned as the "Queen"), and the stock of these corporations was owned by a partnership, known as Corrigan, McKinney & Company (hereinafter referred to as "Corrigan"). The lessee corporations are spoken of collectively in the certificate as the "Queen Company" and the leases as the "Queen leases."

The terms of these Queen leases were such and the condition of the iron business such, in 1897 and 1898, that operations could not be carried on profitably under them, and the lessors had accepted less than the agreed rates of royalty from time to time. The Queen and Corrigan, were largely indebted, and Corrigan desired, in the summer of 1898, to dispose of the rights and interests of the Queen, and, if possible, to get a new lease or new leases, upon more favorable terms for the lessees.

The then officers of the Arctic Company knew of Corrigan's desire and indicated a willingness to negotiate for a new lease. Corrigan brought the matter to the attention of both the Cliffs and the Oliver Company. The Cliffs Company notified the then officers of the Arctic that it desired to negotiate a lease of the Queen properties. No progress, however, was made in these negotiations prior to the time the Cliffs acquired the Healy stock, November, 1898.

In 1897 the Cliffs loaned the Queen $250,000, upon notes guaranteed by Corrigan. To the payment of these notes there was pledged the interest of the Queen in the four mining leases which were assigned and, also, the stock of the Queen. The debt was due, $50,000 in each year, beginning in 1898 and ending in 1902. The assignment to the Cliffs was recorded in Marquette County, and Messrs.

Kaufman and Breitung were notified in 1896 of the existence of these assignments.

In connection with this loan it should be borne in mind that prior to 1897, a railroad had been built from Lake Superior near Marquette to Ishpeming, called the Ishpeming & Lake Superior Company. The Cliffs Company was a large stockholder in this railroad company. Another mining operator was also a large stockholder. An agreement was made between them that certain additional stock should, after the bonds on the road had been paid from earnings, be divided between them in proportion to the traffic that each should have brought to the railroad. In connection with the loan from the Cliffs to the Queen, an agreement was entered into whereby the Queen was to give the Lake Superior & Ishpeming Railroad the carriage of all ore produced by the Queen mines, at a stated price per ton and until an agreed total had been carried, including ore produced by other properties which the Queen might thereafter control, and also the carriage of all its traffic in coal and supplies from the lake to its mines.

There is no finding that the officers of the Arctic, until 1904, had any knowledge, or notice, of the existence of any such traffic contract.

During December, 1898, the Cliffs offered to take a new lease on certain terms, and at about the same time the Oliver offered to take such a lease at a higher royalty and a larger minimum. Both offers contemplated a joint lease from the Arctic and from Kaufman and Breitung, covering the whole title, and were made to Kaufman and Breitung as representing themselves and the Arctic.

In January, 1899, Kaufman and Breitung promised a lease to the Oliver at a 15-cent royalty on condition that the minimum and other terms could thereafter be agreed upon. The Cliffs thereupon offered to take the lease on the same terms which the Oliver might offer, and in addition, to pay a bonus. Kaufman and Breitung refused the offer of the Cliffs. Shortly thereafter they were notified that the Cliffs would not consent to the Oliver lease.

The Cliffs could, and did, thus absolutely block the proposed lease to the Oliver. Kaufman and Breitung could, and did, absolutely block the lease desired by the Cliffs. This was possible by reason of the division of the directorate of the Arctic and the way in which its stock was held—one-half by Kaufman and Breitung, and one-half by the Cliffs interest.

Representatives of the Oliver and of the Cliffs then began negotiating with each other at the instigation of Corrigan, to see whether the Cliffs could be induced to withdraw its opposition to the proposed lease with the Oliver. The result was that the Cliffs offered to withdraw such objection if it should be permitted to buy from the Oliver each year, at the cost of mining, one-quarter of the ore taken out under the proposed lease. This offer was accepted by the Oliver and this arrangement made subject to the final negotiation of all the terms of the lease between the Oliver on one side and the Arctic, represented by Kaufman and Breitung, on the other.

The fact that the Cliffs had withdrawn its opposition became known to Kaufman and Breitung, and that they were at liberty to go ahead with negotiations on behalf of themselves and the Arctic with the Oliver, and that when satisfactory terms had been reached, the Cliffs would assent to the lease. Kaufman and Breitung did not know the terms of the agreement between the Cliffs and the Oliver. This agreement was not disclosed, and the Cliffs requested the Oliver not to disclose the terms of the agreement. Both the Cliffs and the Oliver took pains to put the deal in such shape that papers likely to be seen by Kaufman and Breitung should not reveal the terms of the arrangement. The Cliffs knew that if Kaufman and Breitung ascertained the terms agreed upon they would refuse to go on with the lease to the Oliver. One of them had some personal feeling against Mr. Mather. There was, it is to be observed, a further reason, viz.: that the arrangement in effect placed Messrs. Mather and Hayden on both sides of the transaction, since they were directors in and constituted one-half of the directorate of the Arctic, lessor, as well as president, treasurer and stockholder and attorney, respectively, of Cliffs,

which was directly interested to the extent of one-quarter as lessee.

After the opposition of the Cliffs had been withdrawn, Kaufman and Breitung, in behalf of the Arctic and of themselves, agreed upon the details and all the terms of the lease with the Oliver, insisting upon many concessions and procuring the best terms for the Arctic from the Oliver that could have been procured from anyone. The lease, as so agreed upon, was unanimously approved by a stockholders' meeting of the Arctic. It was also approved by a directors' meeting, by the unanimous vote of the three directors present, Mr. Mather not being present. The lease was signed for the Arctic by Kaufman as president, and Mather as secretary, and Kaufman and Breitung signed in their individual right.

In closing the terms of the lease with the Oliver, Kaufman and Breitung insisted that the Oliver should buy a one-quarter interest in their independent fee in one parcel of the mining property. The Oliver was willing and paid the amount asked. The Cliffs learned from the Oliver of this purchase before the lease was executed, and acquiesced in the Oliver's request that it should buy one-quarter of this interest, or one-sixteenth of the fee, and later paid therefor one-quarter of what the Oliver had paid.

Later, the bargain between the Cliffs and the Oliver was carried out by the organization of the Regent Iron Company, three-quarters of the stock in which was issued to the Oliver and one-quarter to the Cliffs. The new lease was assigned to the Regent, which assumed the traffic contract; paid the amount then due from the Queen on its notes, and undertook to turn over to Corrigan and the Queen 100,000 tons of ore for the Queen's interest in the old leases.

It was further agreed that the Oliver should take, at the cost of mining, three-quarters of the ore produced by the Regent, and the Cliffs, one-quarter. It was further agreed that by notice given in any year before the season of navigation opened, the Cliffs could limit as it wished the amount of ore which it would take under the contract during the

then current year. Mather and Hayden continued to be and act as secretary and director, and director, respectively, of the Arctic, without change (Cert., p. 4, top), and president and treasurer and attorney, respectively, of the Cliffs, the while keeping the conflicting lessee interest of their independent principal, Cliffs, concealed from their fellow Arctic directors, until discovered in 1904, and thereafter continued members of said board and acted as such directors, while retaining the above mentioned agency position in the Cliffs. During all this time the lands of the Arctic were being operated under the Oliver lease in which the Cliffs continued to have the one-quarter lessee interest, and from which the profits here in controversy came.

This arrangement went into effect in the spring of 1899. In 1904 Kaufman and Breitung first learned that the Cliffs had this interest in the lease. Thereupon, the Arctic filed this bill.

The amount paid by the Cliffs to the Oliver for the one-sixteenth interest in the fee was allowed in the accounting herein as a credit to the Cliffs.

ESTOPPEL.

PLAINTIFF NOT ESTOPPED FROM SEEKING RELIEF.

Before proceeding to a discussion of the legal questions reserved by the court below, counsel for the appellants devote several pages of their brief in this court to an argument on the facts under the heading "Estoppel." We are compelled, therefore, at the outset to enter upon some further discussion of the facts.

Appellants' counsel assert that the Arctic Company is now estopped from alleging the invalidity of the transaction because the course taken by the parties in 1899 was by agreement of all the stockholders of the Arctic Company.

This we deny.

The facts above stated from the findings returned by the court below, show that the reason why an agreement was reached in the matter was that a secret bargain had been made between Mather, representing the Cliffs, and the persons representing the Oliver.

The court in Finding eleven, says expressly:

> "The Cliffs knew that if Kaufman and Breitung learned that it was getting one-quarter of the ore, they would refuse to go on."

1. It is said that the Cliffs had contract rights of great value in the four leases then resting upon the property.

There is no finding that those rights were of great value. The leases could not at all times be profitably operated. Whatever they were worth, they were pledged as security to notes aggregating $250,000. Their value at the time could hardly properly be described as "great."

2. On page 3 of the brief it is said that:

> "Kaufman and Breitung refused, without reason or excuse, to make a new lease to the Cliffs."

The finding is that personal feeling held by Kaufman and Breitung, or one of them, against Mather, interfered with leasing to the Cliffs, but there is no finding that their refusal was without reason or excuse. There was, beside personal feeling, an excellent reason why they should not lease to the Cliffs. The Cliffs' representatives constituted half the board of the Arctic directorate, and, without the concurrence of those representatives, no action could be taken by the Arctic to compel compliance with the provisions of a lease to the Cliffs.

3. In the middle of page 4 of the brief is a statement, which is quite inaccurate, viz.: that Kaufman and Breitung agreed with the Oliver that if it would buy some of their individual fee at twice its value, they would make a new lease on the property.

Until Mather made a secret bargain with the Oliver, negotiations were at a standstill. After he made it, and with his consent, Kaufman and Breitung, representing the Arctic as well as their own individual fee, proceeded to negotiate a lease, and it was not until near the close of the negotiations, as found by the court (Finding 14) that the question of selling to the Oliver any portion of their individual fee came up.

It is not denied that whoever took the lease desired a lease of the whole fee, both the half of it owned by the Arctic and the half of it owned by the Kaufman and Breitung families. The existing leases to the Queen were leases of the whole fee.

The impression likely to be given by the language now under consideration is precisely the opposite of that warranted by the findings. The purchase of a part of the individual fee was not a condition precedent to the negotiation of a lease to the Oliver. Weeks before such purchase came up, Kaufman and Breitung had expressed a willingness to make a lease, if proper terms as to royalty, minimum, etc., were agreed upon (Findings 8 and 14).

It is stated that the Cliffs learned of this arrangement, but at first did not know that it was coupled with the proposition to sell some of their private lands.

The impression naturally created by this language is that an arrangement was made with the Oliver in the first place by Kaufman and Breitung for the sale of this individual fee. The course of the transaction has been correctly set forth above.

The negotiations between the Cliffs and Kaufman and Breitung, for a lease to the Cliffs, were abandoned weeks before the time when, near the close of the negotiation of the lease with the Oliver, the question arose of a purchase by the latter company of some of the individual fee of Kaufman and Breitung (Finding 14).

There is a finding that, having learned that the Cliffs would not consent to a lease to the Oliver, Kaufman and Breitung threatened legal proceedings to compel the Cliffs to consent, but never took any steps in that direction.

There is no finding (and there could not be one) that litigation would arise unless the Cliffs surrendered its "independent rights." The question of such "rights," it is plain enough from the findings, cut no figure in the discussion of terms between the Cliffs and the Oliver.

4. The findings do not warrant the assertion on page 4 that Kaufman and Breitung proceeded separately and independently in negotiating with the Oliver, without regard to the interests of the Cliffs or the Arctic.

If the Oliver desired, as it did desire, a lease of the whole fee, Kaufman and Breitung had a right to discuss terms with reference to their individual fee. The finding is explicit that Mather and the Cliffs were willing, having gotten the promise of what they wanted, to commit to directors Breitung and Kaufman the negotiations of terms in behalf of the Arctic.

5. It is said on page 4 that when the Cliffs learned, near the end of the transaction with the Oliver, that Oliver had agreed to purchase some of the independent fee of Breitung and Kaufman, it was definitely advised that the latter were proceeding independently and for separate considerations to themselves, to deal with the "property in question." The only property in question in which the Cliffs had any interest was that which the Arctic owned. There is no ground for claiming that with reference to that property Kaufman and Breitung acted for any separate consideration.

The only discreditable thing about the transaction, viz.: the secret bargain between the Cliffs and the Oliver, in consideration of which the Cliffs agreed to withdraw its opposition to the Oliver lease, is carefully passed over in the brief with the remark:

> "Without setting forth details * * * it is sufficient here to say that Kaufman and Breitung were

informed that this separate agreement had been reached."

As found by the court of appeals, the existence of this separate agreement was sedulously concealed from Kaufman and Breitung. All they knew was that the Cliffs had withdrawn its opposition to the making of a lease with the Oliver. They did not know, as stated on page 5, that the Cliffs Company would cancel its rights. They were informed merely that "an agreement had been reached because of which" the Cliffs would no longer object to the Oliver lease. They did not know this agreement gave the Cliffs a lessee interest, and it was not intended they should (Findings 10 and 11). They knew nothing of the reasons which had induced the Cliffs to agree to vote for the lease.

6. It is said, page 5:

> "It is certainly clear that each side in respect to the new lease was inspired by motives of independent interest, aside from the interests of the Arctic."

For this remark there is no basis in the findings.

On page 6 of the brief, counsel state that they wish to make the point that by the clear agreement of the parties, each side went forward separately and independently representing its own interests, etc., with the clear understanding in advance that the Arctic Company would be wholly disregarded except as a "rubber stamp."

There is, absolutely no basis in the findings for any such statement of fact. The parties did not act, or part with their independent rights, under this understanding.

The Cliffs, through Mather, having secretly gotten its advice, allowed the negotiation of the lease with the Arctic by Kaufman and Breitung, which lease covered, as it naturally would cover, their independent half interest in the fee. With reference to a portion of this half interest, they made an arrangement for a sale, openly and not secretly, and of the proposed sale the Cliffs was fully advised before the lease was signed.

It is said that Kaufman and Breitung understood that the parties were proceeding in disregard of the corporation, and that they knew that the Cliffs had contracted separately with the Oliver for the surrender of the independent rights of the Cliffs.

This statement is wholly inaccurate.

Finally, a practical admission occurs (page 7), that the facts are not exactly as urged in this portion of the brief by the remark that the contracts of the parties *must be held in equity* to amount to an agreement between them that in leasing the property they would disregard the Arctic, etc.

The argument fails upon the facts. There is no basis for the point of estoppel thus urged. There was no such "understanding" upon which all the stockholders acted, that it would be a wrong upon the Cliffs to permit a repudiation of the understanding. It is open to the complainant to insist on the invalidity of the Cliffs' contract on the ground that the contract with the Oliver involved a violation of directorship duty to the Arctic.

Finally, it is said (page 8) that the circuit court of appeals found in the most emphatic way that Mather's conduct was honest.

The court will search the findings of fact in vain for any such finding.

After the statement of the questions of law following the findings of fact, the court of appeals says that it is of opinion that there was no fraud or breach of directorship duty by Mather unless the same arose as a matter of law out of the relations of the parties.

Without here discussing the soundness of the opinion thus expressed by the learned court, it is certainly open to the appellee to argue that the situation was such that as a matter of law there was a clear breach of directorship duty, and that the learned district judges reached the correct conclusion in this regard.

This portion of appellant's brief is said (page 9) to be a preliminary discussion of the "general equities."

It is, we submit, a statement based on a wrong conception of the facts found. It avoids any clear statement of the controlling fact, viz.: that the deadlock in the board of the Arctic was broken because the Cliffs, through Mather, got the secret agreement for ore under the lease, and for no other reason.

There is no basis for the claim of estoppel.

I.

The Cliffs is chargeable with the profits derived under the Oliver lease, although no trust rested directly upon it.

Question Number 1-a.

Is the Cliffs, stockholder in the Arctic and also Mather's independent principal, so far affected by any fiduciary duties which may have rested on its agent, Mather, as a director in the Arctic, that the Arctic may recover from the Cliffs the latter's profits under the lease, although no trust rested directly upon it, and although the director, Mather, received no personal benefit?

Before proceeding to a discussion of this question, we call attention to the last phrase, "Mather received no personal benefit."

From finding of fact No. 2, it appears that Mather owned a substantial amount of the stock of the Cliffs, and that he and his relatives, together, owned about 5 per cent of its stock. Large profits earned by the Cliffs must, it would seem, redound to the personal benefit of Mather and his family.

Passing this matter, the question above quoted involves consideration of the following propositions for which we contend:

1. A FIDUCIARY DUTY RESTED ON MATHER, DIRECTOR OF THE ARCTIC.

2. PROFITS ARISING FROM DISREGARD OF SUCH FIDUCIARY DUTY MAY BE RECOVERED BY THE ARCTIC.

3. SUCH PROFITS MAY BE RECOVERED FROM THE CLIFFS COMPANY UNDER THE FACTS HERE INVOLVED.

1. A FIDUCIARY DUTY RESTED ON MATHER, DIRECTOR OF THE ARCTIC.

The principle underlying the doctrine for which in this regard we contend, was long ago stated by this court in a case where a trustee purchased for himself at judicial sale property of the trust estate.

The case involved a breach of trust by the trustee himself purchasing the estate, being sold at judicial sale on account of the *cestui que trust*.

Mr. Justice Wayne, in delivering the opinion, said:

> "The general rule stands upon our great moral obligation to refrain from placing ourselves in relations which ordinarily excite a conflict between self interest and integrity. It reaches all agents, public and private; but the value of the prohibition is most felt and its application is more frequent in the private relations in which the vendor and purchaser may stand to each other. The disability to purchase is a consequence of that relation between them, which imposes on the one a duty to protect the interest of the other from the faithful discharge of which duty his own personal interest may withdraw him. In this conflict of interest, the law wisely interposes. It acts not on the possibility, that, in some cases, the sense of that duty may prevail over the motives of self interest, but it provides against the probability in many cases, and the danger in all cases, that the dictates of self interest will exercise a predominant influence,

and supersede that of duty. It, therefore, prohibits a party from purchasing on his own account that which his duty or trust requires him to sell on account of another, and from purchasing on account of another that which he sells on his own account."

In speaking of the absoluteness of the rule, he says:

"In New York there has been no relaxation of it, since the decision in the case of *Davoue v. Fanning*, 2 Johnston's Chancery, 252.

"It is a critical and able review of the doctrine, as it had been applied by the English courts of chancery from an early day, and has been received, with very few exceptions, by our state chancery courts, as altogether putting the rule on its proper footing. Indeed, it is not too much to say, that it has secured the triumph of the rule over all qualifications and relaxations of it in the United States, to the same extent that had been achieved for it in England by that great Chancellor, Lord Eldon."

He then states the facts in *Davoue v. Fanning*, as the case of an executor for whose wife a purchase had been made by one Hedden at public auction, *bona fide*, for a fair price, of a part of the estate which Fanning administered, and the prayer of the bill was that the purchase might be set aside and the premises resold.

"The inquiry, in such a case, is not whether there was or was not fraud in the fact. The purchase is void, and will be set aside at the request of the *cestui que trust*, and a resale ordered, on the ground of the temptation to abuse, and the danger of imposition inaccessible to the eye of the court."

Michoud v. Girod, 4 How., 503.

The facts found bearing directly on this subject are as follows:

The Arctic Iron Company filed articles of association in 1883, with a capital stock of $500,000 paid up. Its articles provided for four directors (Cert., page 1).

On December 30th, 1898, William G. Mather and George Hayden were elected directors of the Arctic, and Mather was made secretary (Cert., page 3). At this time, and from thence hitherto, Mather was a stockholder and president and treasurer of the Cliffs (Cert., page 2). At the time of their election as directors of the Arctic, Hayden was attorney for the Cliffs. At the same meeting at which Mather and Hayden were elected directors and Mather made secretary of the Arctic, Kaufman and Breitung were also made directors and Kaufman was made president (Cert., page 3). This make-up of officers and directors continued thereafter without change (Cert., page 4).

Under the findings of facts, therefore, Mather *still remains* director and secretary of the Arctic, as well as president and treasurer of the Cliffs. This dual position is an important factor in determining the answers to be given to the questions propounded.

A director and officer is a fiduciary, and as such is bound to refrain from taking an interest for himself, or an independent principal, on the other side of the contract in which his corporation is interested. He may not secretly make a profit out of it for himself (1) or for another (2), even though there was no actual fraud (3), notwithstanding the bargain also profited his company (4), and notwithstanding his motives may have been of the best (5).

The proposition above stated is amply supported by many adjudicated cases, among which are the following:

McGourkey v. Toledo Ry. Co., 146 U. S., 536.
Wardell v. R. R. Co., 103 U. S., 651.
Gilman R. R. Co. v. Kelly, 77 Ill., 426.
European R. R. Co. v. Poor, 59 Me., 277.
Cumberland Coal Co. v. Sherman, 30 Barb., 553.
Elliott v. Baker, 194 Mass., 518.
Bird Coal Co. v. Humes, 157 Pa. St., 278.
Lum v. Clark, 57 N. W. Rep., 662 (Minn.)
Flint R. R. Co. v. Dewey, 14 Mich., 477.
Woodstock Iron Co. v. Extension Co., 129 U. S., 643.

In *Gilman Etc. Railroad Co. v. Kelly*, 77 Ill., 426, a contract was made on May 20th, 1870, by the directors of the railroad company with the Morgan Improvement Company, for the construction of the railroad company's railroad, for which stock and bonds of the railroad company were to be issued to the Improvement Company. On June 7th, 1870, the contract was submitted to and approved by the stockholders of the Railroad Company. In the following September, three of the directors of the Railroad Company, one of whom was its president, became directors of the Improvement Company, having bought shares in that company. The contract was performed "in all its essential features" and stock and bonds were issued to it by the Railroad Company. The suit was brought by Kelly, as a stockholder of the Railroad Company, in behalf of himself and the other stockholders, to have the contract declared illegal, and for an accounting by said three directors, and by the Improvement Company for the profits realized by them.

The court found as facts that there was no fraud in the making of the contract; the subject of any director taking stock in the Improvement Company had not been suggested before making the contract, and it was entered into in good faith with the Improvement Company.

The court held the complainant entitled to an accounting of the gains and profits of the directors and the Improvement Company.

The court say (page 432):

> "The vital question is, whether it was lawful for any number of the directors of the Railroad Company to become members and stockholders in the Morgan Improvement Company, with whom they had a construction contract. Whether the contract was originally valid, is not now an important subject of inquiry; for it was illegal for the directors to become members of the construction company, and participate in the profits, if any should be realized; that fact would establish a right in complainants to have an account taken, as clearly as though the contract, in the first instance, was lawful. The same conclusion

would inevitably follow, and the result, so far as the participating directors are concerned, would be the same."

Again, at page 434, the court say:

"The directors of a railroad company are, in an important sense, regarded as trustees for the stockholders, and it would be a breach of duty to transfer that trust; to assume obligations inconsistent with that relation; to place themselves in opposition to the interests of the stockholders, or in such position where their own individual interests would prevent them from acting for the best interests of those they represent. The rule is the same that applies to all persons acting in any fiduciary capacity that requires the utmost fidelity to the interests of the *cestui que trust*. The rule, in its general sense, embraces every relation in which there may, by any possibility, arise a conflict between the duty to the person with whom the trustee is dealing, or on whose account he is acting, and his own individual interest. 'It acts,' as is well expressed by Mr. Justice Wayne, 'not on the possibility that, in some cases, the sense of that duty may prevail over the motives of self-interest, but it provides against the probability, in many cases, and the danger, in all cases, that the dictates of self-interest will exercise a predominant influence and supersede that of duty.' *Michoud v. Girod*, 4 How., 503. It may be added, the rule stands on the obligation which a party owes to himself and his principal, that forbids him to assume a position which would ordinarily excite a conflict between his individual interest and a faithful discharge of his fiduciary duties. It operates to restrain all agents or trustees, public or private. The inquiry is not whether the contract the trustee has made is the best that could have been made for the *cestui que trust*, or whether it is fraudulent in fact. So strictly is this principle adhered to, that no question is allowed to be raised as to fairness of the contract. The principle has a broader scope. The law has absolutely inhibited the agent or trustee from placing himself in a position where his own private interests would naturally tend to make him neglectful of his obligations to his principal, or where

his position would afford him an opportunity to speculate in the trust property. Accordingly, it is not indispensable there should be actual injury before the act of the trustee will be declared void, as being interdicted by the policy of the law. The *cestui que trust* has his election, to ratify the act of the trustee, and insist upon all the advantage of it, or disaffirm it in toto, as shall be most to his interest."

And again, on page 437, the court say, as follows:

"The ratification of the contract between the Railroad Company and the Morgan Improvement Company by the stockholders' meeting, insisted upon, constitutes no obstacle to the relief sought. Whatever was done at that meeting was not done with a full knowledge of all the facts. It was not then known the president and two of the directors would become members of the Morgan Improvement Company, with whom the contract had been concluded. Had this important fact been known, it might have changed the conclusion of the stockholders. No ratification will estop the principal, unless he has been made aware of all the material facts and circumstances of the transaction that would in any way influence his mind or affect the value of the contract."

In *Wardell v. Railroad Co.*, 103 U. S., 651, the court use the following language (page 658):

"The law, therefore, will always condemn the transactions of a party on his own behalf when, in respect to the matter concerned, he is the agent of others, and will relieve against them whenever their enforcement is seasonably resisted. Directors of corporations, and all persons who stand in a fiduciary relation to other parties, and are clothed with power to act for them, are subject to this rule; they are not permitted to occupy a position which will conflict with the interest of parties they represent and are bound to protect. They cannot, as agents or trustees, enter into or authorize contracts on behalf of those for whom they are appointed to act, and then personally participate in the benefits. Hence all arrangements by directors of a railroad company, to secure an un-

> due advantage to themselves at its expense, by the formation of a new company as an auxiliary to the original one, with an understanding that they, or some of them, shall take stock in it, and then that valuable contracts shall be given to it, in the profits of which they, as stockholders in the new company, are to share, are so many unlawful devices to enrich themselves to the detriment of the stockholders and creditors of the original company, and will be condemned whenever properly brought before the courts for consideration."

In *McGourkey v. Toledo & Ohio Ry. Co.*, 146 U. S., 536, the supreme court, speaking upon the same subject, quote from *Wardell v. Railroad Co.*, 103 U. S., 651, and refer to the above case of *Gilman Etc. Railroad Co. v. Kelly,* and use the following language (page 565):

> " 'All arrangements, by directors of a railroad company, to secure an undue advantage to themselves at its expense, by the formation of a new company as an auxiliary to the original one, with an understanding that they, or some of them, shall take stock in it, and then that valuable contracts shall be given to it, in the profits of which they, as stockholders in the new company, are to share, are so many unlawful devices to enrich themselves to the detriment of the stockholders and creditors of the original company, and will be condemned whenever properly brought before the courts for consideration.' A somewhat similar case was that of *Gilman Etc. Railroad v. Kelly,* 77 Ill., 426, in which it was held to be unlawful for directors of a railroad company to become members of a company with which they have made a contract to build and equip the road, and that, in such case, the stockholders might at their election ratify the act, and insist upon the profits of the contract, or disaffirm it in toto."

In *European Etc. R. R. v. Poor,* 59 Me., 277, a director, who was also president of a railroad company, became interested in the profits to be derived from a construction contract for building the company's road.

The court say (p. 279):

> "If a director be a party to a contract entered into with himself, his duty as an officer is in conflict with his interests as an individual. This is equally so, whether he enters into the contract in its inception or subsequently acquires an interest in it. If he enters originally into the contract as director with himself as a party, it is not difficult to perceive who would have an advantage in the bargain. If he subsequently becomes a partner he places himself in a position in which, when any questions arise as to its performance his interest as a party to the contract conflicts with his duty as an officer."

In *Cumberland Coal Co. v. Sherman et al.*, 30 Barb., 553, a director of a corporation (the Cumberland Company) purchased land from it, and then united with others in forming a new corporation (the Hoffman Company), in which he became an officer and director and shareholder, and on the next day, in pursuance of one entire plan, conveyed the land to the latter company. An action had been brought in the courts of Maryland (16 Md., 456) to set aside the deeds, for the cancellation of a contract for coal transportation, and to compel the lands to be deeded back to the company and an accounting for the coal mined in the interim, and for injunction against the sale of the land or the stock of the new company or the transfer of the contract relating to transportation.

This transaction having come before the supreme court of New York on application for the continuance of injunction, restraining them from transferring their stock in the Hoffman Company, the court, in concluding that the deeds could not be sustained, uses the following language (p. 569):

> "The rule by which agents or trustees are prohibited and rendered incapable of purchasing or dealing with the property of their *cestuis que trust*, is one of universal application, justified by a current of strong and high authorities, and is adhered to with stern and inflexible integrity; and the consequence of such dealing and purchasing is that the agent or trustee is liable at any time, on the application of the

> *cestui que trust*, and as a matter of course, *and without reference to the fairness or unfairness of the transaction, the adequacy or inadequacy of the price paid, or any other equities of the agent or trustee*, to have the sale set aside; such has been the uniform administration of the law in England, and where the civil law prevails, and in this country."

Again the court say (p. 597):

> "I have arrived at this result without considering the question of fraud raised in the complaint, and denied by answering affidavits. I have chosen to place my decision on higher and more satisfactory grounds. I adopt the language of Lord Eldon in *ex parte* James (8 Vesey, 345): 'It rests upon this, *that the purchase is not permitted in any case*, however honest the circumstances, the general interests of justice requiring it to be destroyed in every instance, as no court is equal to the examination and ascertainment of the truth, in much the greater number of cases.'

In *Elliott v. Baker*, 194 Mass., 518 (80 N. E., 450), two out of three of the directors, for the purpose of taking control away from the majority stockholder, caused 900 additional shares to issue to a friend, which, together with their own holdings, would make a majority. This was done without offering the same competitively to the other shareholders.

Held, that such issue and sale, although made at what would under ordinary circumstances have been a fair price, was invalid, if the purchaser knew and participated in the unlawful act.

The court say (p. 523):

> "Directors of a corporation act in a strictly fiduciary capacity. Their office is one of trust and they are held to the high standard of duty required of trustees. They cannot be permitted to so manage the affairs of the *cestui que trust* that the system of business corporations, by which so large a part of the world's work is now conducted, 'may become a system of frauds.'"

The case of *Bird Coal & Iron Co. v. Humes,* 157 Pa. St., 278, cited in appellant's brief, page 10, is an interesting one. The court say (p. 287):

> "But a director is a trustee for *the entire body of stockholders,* and both good morals and good law imperatively demand he shall manage *all the business affairs of the company* with a view to promote, not his own interests, *but the common interests,* and he cannot directly or indirectly derive any personal profit or advantage by reason of his position, distinct from his co-shareholders. * * * By assuming the office, he undertakes to give his best judgment in the interests of the corporation in all matters in which he acts for it, untrammeled by any hostile interest in himself or others. There is an inherent obligation on his part that he will in no manner use his position to advance his own interest as an individual, as distinguished from that of the corporation. * * * And all secret profits derived by him in any dealings in regard to the corporate enterprise must be accounted for to the corporation, even though the transaction in which they were made also advantaged the corporation of which he was director."

In *Lum v. Clark,* 57 N. W., 662 (Minn.), one McEwen was superintendent and general manager of a mill company, with a saw mill and a logging railroad, which was considering the extension of its railroad to its mill and remodeling the latter. Lum in consideration of McEwen's agreement to use his influence and authority to secure the removal of the mill and the extension of the railroad to the town of Brainerd some distance away, promised to pay to Clark for the benefit of McEwen, $5,000 nine months after date on condition that the mill be removed and the railroad extended within said nine months. Suit to cancel above obligation.

The court say (p. 662):

> "That this contract was illegal and void on grounds of public policy will not admit of a moment's doubt. Loyalty to his trust is the first duty which an agent owes to his principal. Reliance upon an agent's in-

tegrity, fidelity and capacity is the moving consideration in the creation of all agencies; and the law condemns, as repugnant to public policy, everything which tends to destroy that reliance. *The agent cannot put himself in such relations that his own personal interests become antagonistic to those of his principal.* He will not be allowed to serve two masters without the intelligent consent of both. Actual injury is not the principle the law proceeds on, in holding such transactions void. Fidelity in the agent is what is aimed at, and as a means of securing it, the law will not permit him to place himself in a position in which he may be tempted by his own private interests to disregard those of his principal. * * * It is not material that no actual injury to the company resulted, or that the policy recommended may have been for its best interest. Courts will not inquire into these matters. It is enough to know that the agent in fact placed himself in such relations that he might be tempted by his own interests to disregard those of his principal."

The fiduciary relation exists notwithstanding a director may not have power actually to control the corporate action.

Flint Ry. v. Dewey, 14 Mich., 477.
People v. Overyssel, 11 Mich., 222.
West v. Camden, 135 U. S., 507.
European Railway v. Poor, 59 Me., 277.
Bird Coal Co. v. Humes, 157 Pa. St., 278.

2. PROFITS ARISING FROM DISREGARD OF SUCH FIDUCIARY DUTY MAY BE RECOVERED BY THE ARCTIC.

McGourkey v. Toledo Ry., supra.
Wardell v. Railroad Co., supra.
Gilman R. R. v. Kelly, supra.
Parker v. Nickerson, 112 Mass., 195.
Rutland Electric Lt. Co. v. Bates, 68 Vt., 579.
Yale Gas Stove Co. v. Wilcox, 64 Conn., 101.
Dutton v. Wilmer, 52 N. Y., 312.
Chandler v. Bacon, 30 Fed., 538.
McKinley v. Williams, 74 Fed., 94.
Farmers and Merchants Bank v. Downey, 53 Calif., 466.

In *Parker v. Nickerson,* 112 Mass., 195, the action was by receiver of a corporation, to recover secret profits made by the defendants, who were directors of the company, in a sale by them of boats to the company.

The court say (page 196):

> "As a general rule, a trustee or agent cannot purchase on his own account what he sells on account of another, nor purchase on account of another what he sells on his own account. He cannot unite in himself the opposite characters of buyer and seller. And if he does so, the *cestui que trust* or principal, unless upon the fullest knowledge of all the facts he elects to confirm the act of the trustee or agent, may repudiate it, or he *may charge the profits made by the trustee or agent with an implied trust for his benefit. Michaud v. Girod,* 4 How., 503."

In *Rutland Electric Light Co. v. Bates,* 68 Vt., 579 (35 Alt., 480), suit was brought by the corporation against Bates, among other things, to recover a commission received by him from the Thomson-Houston Company, with whom a contract was made to furnish to the complainant company certain apparatus. The commission was obtained by the defendant through a secret arrangement made between him and the Thomson-Houston Company. The defendant was at the time a director, treasurer and principal manager of the complainant.

In awarding recovery to the complainant, the court uses this language (p. 584):

> "He could not, from such purchases or contracts, obtain authority to pay himself a commission, or profit, nor to pay any other director, or manager, of the orator a commission or profit thereon. Such is the well-established law, by many decisions. In *Cook's Law of Stock & Stockholders*, 649, it is stated:
>
> " 'The law is well settled that a director cannot become a contractor with the corporation, *nor can he have any personal and pecuniary interest in a contract between the company, of which he is a director, and third persons.* The director cannot be interested in the construction company, at the time the contract is made, nor subsequently, and it is immaterial that the contract is fair, or even to the advantage of the corporation. The corporation, upon discovering the fact that the director is interested in the construction company, may compel him to pay over to the corporation all profits that he has derived from the construction contract. * * * Nor is a contract valid, and enforceable against the corporation, where the parties contracting with the corporation have given to the directors of the corporation a secret interest in the profits of the contract.' "

In *Yale Gas Stove Co. v. Wilcox*, 64 Conn., 101, an action sustained to compel the defendant, who acted as promoter of the company, to account for secret profits obtained by him while acting as promoter.

The court uses this language (p. 127):

> "So also, in case of wrong dealing by a trustee, the rule is, when the facts come to the knowledge of the *cestui que trust*, he may either affirm or repudiate the transaction, and if he does the former he may yet recover secret profits. Thus, where a partner sold his own goods to a partnership without the knowledge of his associates, he was held liable to account to them for the profits. *Bentley v. Craven*, 18 Beav., 75. See also, *Kimber v. Barber*, L. R., 8 Chan. App., 56; *Getty et al., v. Devlin et al.*, 54 N. Y., 412.
>
> "The same rule applies in the law of principal and agent, and of attorney and client; indeed

> in every case where one improperly conducts himself to his own advantage while acting in any fiduciary capacity. The language, therefore, cited from *Mallory v. Mallory-Wheeler Co.*, and the statement in *Tryon v. White & Corbin Co.*, 62 Conn., 173; 25 Atl., 712, that 'an acceptance of the benefits of the transaction imposes an obligation to assume its burdens,' and the principles stated in other decisions relied upon by the defendant, have no legitimate application to cases where a corporation seeks to recover from a promotor or director money had and received, which in equity and good conscience belonged to the corporation. Instead of rescinding the transaction of purchase, the corporation by its suit, affirms it and enforces the real contract as made for its benefit, and not the pretended contract, as simulated, in order to defraud it. In such a case the corporation recognizes the obligation to assume the burdens, and only demands that it shall receive 'the benefits of the transaction.' "

In *Dutton v. Willner*, 52 New York, 312, the action was brought to compel defendant to account for certain moneys alleged to have been received by him as agent. The court, at page 318, uses the following language:

> "It is a well settled and salutary rule that 'a person who undertakes to act for another in any matter shall not, in the same matter, act for himself.' It is only by a rigid adherence to this simple rule that all temptation can be removed from one acting in a fiduciary capacity to abuse his trust, or seek his own advantage in the position which it affords him. One consequence of a violation of the rule is that the agent must, at the option of his principal, account to him for any profit he may have made by the transaction."

In *Farmers' and Merchants' Bank v. Downey*, 53 Cal., 466 (31 Am. Rep., 62), it appeared that a director in a banking corporation loaned its moneys, taking proper notes for the repayment thereof, and exacting as a condition precedent to the granting of the loan an agreement that he should have a share in the profits of the purchase of lands, which the bor-

rower expected to effect with the aid of the money so borrowed. The corporation, subsequently becoming advised of this agreement, demanded that its director assign the same to it, and this demand being refused, brought a suit to charge the director as its trustee.

In sustaining the relief demanded, the court said (p. 468):

> "Upon well settled principles governing courts of equity, the defendant cannot be permitted to retain these profits for himself. They constituted part of the consideration which the borrowers paid or agreed to pay in obtaining the loan, and are as clearly the property of the corporation as is the interest accrued and stipulated to be paid on the face of the note itself. In making the loan the defendant was acting as director —the president—of the corporation, plaintiff here. He was its trustee. 'The officers and directors of a corporate body * * * are trustees of the stockholders, and cannot, without being guilty of fraud, secure to themselves advantages *not common to the latter. (Bigelow on Fraud,* page 248 and cases cited note)'."

3. Such profits may be recovered from the Cliffs Company under the facts here involved.

Emery v. Parrott, 107 Mass., 95 (at 100, 103).
Paducah Iron Co. v. Hays, 24 S. W., 237 (Ky.), at 238.
Paducah Iron Co. v. Mulholland, 24 S. W., 624 (Ky.)
Wayne Pike Co. v. Hammons, 27 N. E., 487 (Ind.; at 490).
Boston v. Simmons, 150 Mass., 461; 23 N. E., 210.
Hoffman Coal Co. v. Cumberland Coal Co., 16 Md., 456; 77 Am. Dec., 311.
Zinc Carbonate Co. v. Bank et al., 103 Wis., 125; 79 N. W., 229.
Lewis v. St. Albans Works, 50 Vt., 477.

In *Emory v. Parrott,* 107 Mass., 95, the owner of a coal mine obtained the services of Parrott to find capitalists to organize a company with a capital stock of $150,000, one-half

the stock to be subscribed for, and the other half taken by the mine owner in payment for the mine, fifteen per cent of which the mine owner was to give to Parrott for his services. The scheme was carried out. Parrott induced the complainants to take the stock, acting therein as their agent without their knowledge of his arrangement with the mine owner by which he was to give him fifteen per cent of the stock. Defendant Head did not act in any fiduciary capacity towards the complainants, but aided and assisted Parrott in the transaction, and by arrangement with him shared with him in the stock received by the latter.

The court held Parrott to account for the stock received by him upon the ground of his fiduciary relations to the complainants as subscribers of the stock while secretly obtaining the profits charged to himself.

The court adjudged Head to account for the stock received by him, not on the ground of any fiduciary relations between him and the subscribers to the stock, but on the ground that he knew of Parrott's position towards them and united with Parrott in the transaction and received a share of the secret commission.

The court say (page 100):

> "The case of the defendant Head stands somewhat differently, but is governed by the same general principles. He did not stand in any fiduciary relation to the plaintiffs. But he knew the position of Parrott, and became the partner of Parrott, uniting with him to effect a sale of the property to Parrott and the plaintiffs, for the sake of dividing with Parrott the secret commission which the owner of the property had agreed to pay for effecting the sale. He was fully cognizant of the illegal conduct of Parrott, and cooperated with him in inducing the plaintiffs to make the purchase. He participated in the profits of the transaction; and the court are of opinion that he as well as Parrott must disgorge the secret gain which they thus jointly obtained and divided with each other."

In *Paducah Iron Co. v. Hays,* 24 S. W., 237 (Ky.), the owners of certain iron lands, three of whom were directors of the iron company, sold the lands to the company at the valuation of $100,000, in payment for which ten thousand shares of the stock of the company were issued, of which shares forty-five hundred were set apart for those owners of the lands who were directors, and certain other directors of the company. Hays, who was experienced in iron interests, was induced to become president of the company upon an agreed salary, and on condition that he be furnished a block of the stock of the company. To comply with this agreement the defendants who received the said forty-five hundred shares delivered to Hays some of those shares.

On suit to recover for Hays' salary, held that the forty-five hundred shares of stock belonged to the company, and that Hays, although innocent of any wrong in the procurement of the shares obtained by him, having become president of the company and having had opportunity to know of the manner in which such shares were issued, must account to the company for their value.

In *Paducah Iron Co. v. Mulholland,* 24 S. W., 624 (Ky.), Mulholland, who was not a director of the company, became owner of one hundred shares of the said forty-five hundred shares issued for the directors.

The court found that Mulholland took the stock "with full knowledge of the scheme in pursuance of which it was issued and divided," and held Mulholland to account for the stock received by him.

In *City of Boston v. Simmons and Wilson,* 150 Mass., 461, a declaration alleged Simmons, a member of the city water board, which was authorized to select and purchase land for a reservoir, collusively agreed with Wilson to inform him of the land the board was considering as suitable and the price they would consider suitable; that Wilson should then buy it, resell it to the board at an advance in price, and they would divide the profits.

Simmons later advised Wilson the board was considering a certain lot. Wilson purchased it and later sold it to the board at an advance, and they divided the profits.

Declaration demurred to. Overruling the demurrer, and holding Simmons liable; in respect to Wilson's liability, the court say (p. 465):

> "The abuse of trust of which the agent is guilty with his (Wilson's) knowledge and co-operation is a wrong for which both are liable, as the injury to the principal is the result of their combined action. Where an agent purchased property for his principal, and falsely represented that he had paid for it a larger sum than he had actually paid, it was held that he would be liable for such overplus. There is no reason why one who has intentionally co-operated with him, and has enabled him to commit the fraud, should not be equally liable. *McMillan v. Arthur*, 98 N. Y., 167. The owner or *cestui que trust* may pursue the trust funds into whosesoever hands they may have passed so long as they can be traced and knowledge of their character can be brought home to the possessor. Not less should the principal, who has been wronged by the misconduct of its own agent, be allowed to pursue, not merely him, *but those who have actively co-operated in his breach of duty, and accepted their share of the profits of the transaction.*"

In *Hoffman Coal Co. v. Cumberland Coal Co.*, 16 Md., 456, 77 Am. Dec., 311, a director of a corporation (the Cumberland Company) purchased land from it and then united with others in forming a new corporation (the Hoffman Company), in which he became an officer and director, and for almost all the shares of which he subscribed, and on the next day, in pursuance of one entire plan, conveyed the land to the new company.

The action was one of injunction in equity to have set aside certain deeds of land from the company to Sherman and Dean. The cancellation of a contract for coal transportation between the company and these individuals over a railroad belonging to Dean and to compel a transfer

of the lands (so deeded) back to the company (the same having been transferred by Dean and Sherman to the new company) and for an accounting as to coal mined and an injunction against the sale of the lands or the stock of the new company or the transfer of the contract relating to transportation. The bill charges both Dean and the new company before they acquired any rights with having had full notice of the fraud in the sale, in the procurement, origin, formation, execution and delivery of the deeds and transportation contract, and of the facts relating thereto, Hoffman being practically the new company and Dean in a measure his tool.

This was denied and the company claimed to be a *bona fide* purchaser for value without notice, but the court held that under all the circumstances Dean must have known and the new company was but a contrivance to effectuate the end.

The court say (page 509):

> "As to Dean, it is only necessary to observe, that it is impossible to believe he was ignorant, when he became associated in the transaction, of the fact that Sherman was a director in the Cumberland Coal & Iron Company. We cannot suppose him to have become a party to a contract, involving enormous sums of money and great liabilities; without some knowledge of the existence and organization of the corporation with which he was dealing to so great an extent. • • •
>
> We are led to the conclusion, that he had knowledge of the relation which Sherman *bore* to the coal and iron company, *and is, therefore, affected with whatever of legal disability belonged to Sherman, by reason of that relation.*"

In *Zinc Carbonate Co. v. First National Bank et al.*, 103 Wis., 125, the facts alleged among others were that defendant bank had recently foreclosed a chattel mortgage on a mill designed to treat metallic ores, from an insolvent corporation of which defendants Hayden and Savage were stockholders. The mill was worth not more

than $3,000 when it came to the bank. The defendants had an option to purchase a mine producing ores proper to be treated in said mill, said mine not exceeding in value $5,000.

The defendants agreed with each other to organize a corporation with $25,000 capital to be mostly subscribed by outside parties, and obtain control themselves of its organization and books and induce it to purchase the mill plant at $13,000 on the belief as to all stockholders not in the fraudulent scheme that it was worth that sum and could not be bought for less, and belonged to the old milling company, and to purchase the mine for $7,000 on like belief as to its value on the part of outside stockholders, and that it could not be bought of the proprietors for less, thereby making themselves a secret profit of $12,000; that the plaintiff corporation was formed pursuant to aforesaid agreement, all its stock being in good faith subscribed by outside parties except $2,000 each by Hayden and Savage, it being a part of the fraudulent agreement that they should not and they did not part with value for their subscriptions. Savage and Hayden were elected directors, Hayden becoming president and Savage secretary of the plaintiff corporation and thus obtaining control of its organization. They successfully carried out the fraudulent scheme, they pretending to pay $13,000 for the mill and $7,000 for the mine, and the outside stockholders believing such pretense. On overruling a demurrer to the bill, the court say:

> "Savage and Hayden occupied positions of trust and confidence as to the subscribers to the stock of the corporation in the first instance, and after its organization they occupied such positions in regard to it as directors and officers. In that situation, for Hayden and Savage to pretend that the mine was the property of third persons and could be bought only for $7,000, while they and the bank secretly controlled the right to purchase it for $2,000 less, and, by that means, acting for the buyers ostensibly, but secretly for the sellers, of whom the bank was one, to make the sale of the property to appellant, *rendered all of the defendants* liable to refund

> the profits they made out of the transaction and without reference to the proportion which each received of the fruits of the fraud; and an equitable action to charge them as trustees of their ill-gotten gains and to compel an accounting for and restitution of the same, was proper, though not the exclusive remedy for the wong."

In *Lewis v. St. Albans Works*, 50 Vt., 477, the court, in discussing this question, say (p. 482):

> "Whenever the trustee has been guilty of a breach of trust and has transferred the property by sale or otherwise, to any third party, the *cestui que trust* has a full right to follow such property into the hands of such third party, unless he stands in the situation of a *bona fide* purchaser for value, without notice."

4. In view of the law settled by the above cited decisions, we submit there should be no doubt as to what is the proper answer to the questions above stated.

APPELLANTS' POSITION ON THIS QUESTION DISCUSSED.

The appellants appear not to deny, but to admit, the soundness of the propositions we have discussed.

(a) The point first made by them is that in general, stockholders in a corporation as such do not occupy a fiduciary relation to each other.

However sound the point may be as an abstract proposition, we submit it is of little importance in this discussion.

Not only by his control of the stock owned by the Cliffs in the Arctic, could Mather preclude the favorable consideration of the Oliver lease, but by his own vote and that of Cliffs' attorney, Hayden, he could do so in the board of directors, and he let it be known that he would block the favorable consideration of this lease. Having used his position to block the lease until he got the secret

bargain from the Oliver for the ore, he cannot be heard to say he was guilty of no breach of fiduciary duty merely because he was a stockholder as well as a director and officer.

Under the law of Michigan he cannot be a director unless he is a stockholder. In the cases cited above the same argument could have been made with equal force. It would completely upset the well-settled law if a director could avoid responsibility as a fiduciary for a secret profit made by him in connection with the affairs of his company by saying that in making the bargain he dealt as a stockholder and not as a director.

(b) It is argued in this connection that Mather was not acting for the Arctic in his dealing with the Oliver, and that his dealing was with the consent of all parties.

The facts do not bear out the proposition. The other officers of the Arctic knew nothing of his dealings with the Oliver, and were carefully kept from knowing anything of them. They merely learned in February, 1899, that he had withdrawn his expressed opposition to the Oliver lease. They did not know why, *nor had they means of knowing.* He took care that they should not know that he had been dealing with what his counsel now call the independent rights of the Cliffs, in which the Arctic had no interest. The Arctic had an interest in the old leases. It was lessor of one-half of the fee covered by them, with the right to forfeit them for non-fulfilment of their terms. The consideration moving to the Cliffs—that is, the one-quarter of the ore mined under the new lease at cost—was plainly the result of Mather's consent to the Arctic's making any lease at all to the Oliver. The abrogation of the then outstanding leases was a mere incident to that consent. Unless the new lease had been agreed to, and apart from that lease the so-called "rights" would not have been surrendered by Mather.

The Cliffs was to get one-quarter of the ore taken from land belonging to the Arctic as the fruits of the secret bargain. It was to get it as the result of the conduct of

Mather, who, as a director of the Arctic, was agreeing that that company should make the lease, and at the same time was bargaining with the Oliver for one-fourth of the profits to be made from the Arctic's land. The bargain could be carried through only if Mather, as director and officer of the Arctic, acted and voted so as to enable the lease to be made.

(c) An argument is made (brief, page 12) that the question stated by the court should not be answered as asked, but in some other way; that the "interest" in the lease is only one of several important things to be considered.

If the record of the whole case were here, it is possible that this suggestion might be the proper subject of an argument. As the record stands, we submit that it is not. It is not open to appellants to say that the interest in the lease is not the matter before the court; that is to say, the profits which resulted to the Cliffs from the secret bargain negotiated by its president, who was also the Arctic director, with the Oliver for the benefit of his independent principal, the Cliffs.

This is what the lower court has based its question upon. It is not accurate to say, nor is it warranted by law or the findings, for counsel to say (brief, page 12), that plaintiff is entitled to relief only in case the "contract" was held in trust for the Arctic.

If the matter were proper to be argued, it is plain that the distinction sought to be drawn is over fine, and one upon which a court of equity would not base a ruling in this case. The breach of Mather's trusteeship duty is what is complained of. The profits flowing to appellants because of that breach are what are sought, whatever form they take.

The secret agreement for the ore was that which enabled the lease to be made. The profits sought to be recovered are the results of the lease.

(d) On page 13 of the brief is reiterated the statement that Kaufman and Breitung knew, through Mr. Mather's negotiations, that the so-called "rights" had been bought out by the Oliver.

All they knew was that

> "*an agreement* had been reached between the Oliver and the Cliffs because of which the Cliffs would no longer object to the Oliver lease" (finding 10).

Its nature or to what it related was carefully consealed (finding 11).

They certainly had no idea that in it was involved a secret interest of the Cliffs in the proposed lease (finding 11).

(e) On page 14 of the brief it is argued that the secret arrangement with the Oliver did not contemplate any wrongful act on Mather's part, and that there was no such act.

This, of course, is to beg the whole question. If Mather could lawfully get a secret profit by dealing with the Oliver about the Arctic's ore, then the argument is sound; otherwise, unsound. The whole involved argument here seeks to impress the court with the idea that the real inducement to Cliffs was payment of its debt and cancellation of its so-called "rights" under its pledge of the leases; whereas, it is perfectly plain that the real inducement was the secret promise of ore at mining cost, and profits to be derived therefrom.

It is argued that there was no conscious fraud on Mather's part. Finding No. 11, on concealment by him, is hardly consistent with this claim; but if it is, the law is careful to quicken his conscience and to forbid such juggling with duty by a director and officer of a corporation, on the plea that he did not mean to do anything wrong. Public policy prohibits such dealing.

(f) There is no finding that the Oliver demanded (as stated, brief, page 16) the cancellation of the old leases

as a prerequisite to the new lease. Corrigan was seeking to get rid of them as a burden upon him and his company, and in order to accomplish this, trying to get some one to take a new lease. The Cliffs wanted the entire new lease itself. Failing this, it was content with one-quarter of the fruits of the new lease. This accomplished, it was ready to do everything necessary to cancel the old and create the new leases (finding 10). The surrender of the old leases was not, and the secret arrangement for an interest in the new lease plainly was, the consideration which induced the Cliffs no longer to block the proposed lease with the Oliver. The Cliffs was the beneficiary of an act equitably, if not morally, unjustifiable on the part of Mather, director and officer of the Arctic.

(g) An examination of the findings discloses that the whole argument of appellants' counsel on this point is outside the facts found, and the argument is wholly an argument on assumed facts. The legal principles we rely upon cannot, we submit, be brushed aside as inapplicable, even by the ingenious argument of counsel, when the findings are studied and counsel's statements tested by them.

II.

Rescission is not the only remedy open to appellee.

Question 1-b.

Is the Arctic's remedy, if it has any against the Cliffs, confined to rescission?

As this question is stated in the certificate, preceded by the word "or," if Question 1-a is answered in the affirmative, this question must be answered in the negative.

If we are right in our contentions as to the answer to Question 1-a, there is, it would seem, no necessity for discussing at length the question of rescission. It certainly is not the only remedy open to the Arctic, if it may insist upon recovering the profits derived by the Cliffs from the operations of the lease, which was made possible by the secret bargain with the Oliver.

Counsel for appellants, however, devote nearly one-third of their brief to a discussion of the question, and that on the theory (bottom of page 16) that the Cliffs is affected by Mather's relation to the Arctic, and that Mather was guilty of a violation of duty to the Arctic.

We proceed, therefore, to discuss the points made by the appellants in this portion of their brief.

Counsel admit that a person induced to enter into a contract through fraud has not only the right to rescind upon discovery of the fraud, but to affirm the contract and require his fiduciary to account to him for the latter's profits.

Appellants, however, contend that under the facts only the remedy of rescission was available to the Arctic when its officers discovered in 1904 that the Cliffs, since early in 1899, had had a secret interest in the Oliver lease.

1. A statement of facts, as claimed by counsel, is contained on pages 17 and 18 of appellants' brief. We regret to be obliged to call attention to two of these statements which are inaccurate.

On page 17 it is said that the facts in relation to the arrangements between the Queen and the Cliffs were known to Kaufman and Breitung before 1898.

These gentlemen knew in February, 1898, that the Cliffs had become interested in the Queen leases and that it desired notice in case the lessor made any change or the lessees made any default (see finding No. 5). They did not know, and had no means of knowing, anything about the contract for the carriage of ore.

Certain language on page 18 may lead to a misapprehension of the facts. After stating that the Cliffs and Oliver negotiated the secret contract, the statement is made in the next paragraph that Kaufman and Breitung were informed of the arrangement. All that they knew was that some agreement had been reached between the Oliver and the Cliffs (finding No. 10). They did not know, and were carefully prevented from knowing, what the arrangement was (finding No. 11).

2. Appellants' counsel proceed (pages 18 and following of the brief) to argue that accepting money upon the Queen notes before it was due, permitting a substitution in the traffic contract, forbearing to exercise its right to refuse to accept payment of the notes and its right to refuse to release the Queen from the traffic contract, constitute a valid consideration for the secret bargain with the Oliver.

In connection with the Question 1-a, we have already called attention to the fact that the true and moving consideration of the bargain with the Oliver was the promise of the Oliver that the Cliffs should get a portion of the ore in the ground belonging to the Arctic. Whether or not such forbearance to insist upon rights might have been a valid consideration under other circumstances for some promise of the Oliver, is not important here. The real

consideration was the promise to get ore, and the forbearance to exercise the rights spoken of was only incidental to the accomplishment of the ultimate desire and purpose of the Cliffs.

Counsel appears to be driven to the contention in this connection that the contract with the Oliver was solely based upon the surrender of the so-called "rights." The plain facts show the hollowness of the contention.

In this connection (on page 21) it is urged as of some weight that the Cliffs assumed the risks and hazards of this new mining venture.

Just what force this statement is supposed to have we do not know. So eager was the Cliffs to get the ore that it was anxious to get a lease of the whole property and assume all the risks of mining, but in its bargain with the Oliver it was shrewd enough to safeguard itself by providing that

> "by notice given in any year before the season of navigation opened"

it could

> "limit the amount of ore which it would take under the contract during the then current year"

(it being contemplated that all ore shipments would be by water between April and December) (finding No. 13).

3. It is next urged that a fiduciary is obliged to account only when he has wrongfully received something as the result of his conduct in the fiduciary relation.

At the risk of repetition, we call the court's attention to the fact once more that large profits to the Cliffs were the direct fruits of the lease; that the lease was made because Mather withdrew his opposition to leasing to the Oliver. He withdrew such opposition because of his secret bargain for ore. As director and officer of the Arctic, he was in a position to prevent the possibility of making a lease with the Oliver until he had procured secretly for

Cliffs, his own independent principal, and without the knowledge of the other directors of the Arctic, the Oliver's promise that the Cliffs should become secretly interested in the forthcoming lease.

Part of the ore bargained for was that of the Arctic. Mather, whose relation enabled him to prevent action by the Arctic, used his power with reference to the property of the Arctic until he had procured a secret advantage for his independent principal, the Cliffs. This advantage was the result primarily of his dealings with the property and affairs of the Arctic.

Whatever words may be used with reference to the transaction, the plain fact is as stated.

4. Beginning at page 23 of their brief, counsel discuss for several pages certain cases from which they quote at length as being the type to which the case at bar belongs. They are all cases in which an agent who buys property for a company, has, without disclosing his ownership, sold to it property of his own, acquired *before* his agency relation came into existence.

Before discussing these cases, it is to be noted that *here* the corporate agent was not selling anything to his own principal, nor surrendering anything to it. The transaction was between the agent and a third party. The secret bargain was made by Cliffs through Mather with the Oliver. Payment of the Queen notes was made by the Oliver; not by the Arctic. The collateral was surrendered to Corrigan; not to the Arctic. The traffic contract, of which the Arctic was ignorant, was assumed by the Oliver, or, ultimately, the Regent.

The plaintiff is not seeking any profits which may have arisen to the Cliffs directly from the payment of the Corrigan notes, or indirectly from the assumption by the Oliver or Regent of the traffic contract.

The Cliffs got a secret profit out of the lease itself, resulting from its withdrawal of opposition. A proper accounting for those profits is sought here.

Appellants' theory seems to be that where "property" or "rights" acquired from an independent source and before the trust relation was established are used to secure a secret advantage to the independent principal, *in the very subject matter of the agency*, the agent is not only thereby absolved from the consequences which would otherwise attend his breach of duty, but also thereby purchases immunity to continually remain in a position *where his duty to his cestui que trust and his interest for his independent principal conflict*, and without incurring any unpleasant consequences to himself or his independent principal.

In this case a director and officer of the Arctic Company claims to have secretly used the "property" or "rights" of the Cliffs to secure for that company something of value under the very lease he was at that very moment executing as secretary on behalf of his *cestui que trust* as lessor. He claims that the use of such "property" and "rights" exempts the Cliffs and himself from the consequences usually flowing from such a breach of trust, as well as enabling him to remain indefinitely as director of the Arctic and at the same time serve the adversary interests of the Cliffs as its president, treasurer and agent.

We proceed to comment upon the cases upon which opposing counsel lay most stress:

In re Cape Breton Co., L. R., 26; Chan. Div., 221; same case on appeal, L. R., 29; Chan. Div., 795, the case principally relied on by appellants to establish this doctrine, was very different from the case at bar.

Pearson, J., states the facts as follows (p. 231):

> "These coal areas had been purchased by the association of which Mr. Fenn (the director sought to be charged) was a member for themselves. *The Cape Breton Company was not then in existence.* There can be no doubt whatever that at that time the members of that association or partnership had a right to deal with the coal areas in any way they pleased, and, indeed, Mr. Bentincks' counsel very

> fairly admitted that they cannot put their case so high as to say, that, at the time when Mr. Fenn and his partners in the coal area association purchased these properties, they purchased them for the Cape Breton Company, *or can be considered as having been trustees for that company.*"

Again, he says (p. 235):

> "In cases like the present, where there has been no legal fraud, where the vendor has simply, *either from ignorance or error,* abstained from giving the purchaser, his principal, all that information which the court very properly considers that he ought to give, the vendor may very reasonably say: 'I was willing to sell for that price, but, if I had been told I should receive a smaller price, I would have declined to sell at all.' "

In that case there was no evidence whatever of an agency at the date of the original purchase, nor that there was any designed or wilful concealment or continuing breach of trust, such as exists in the case at bar.

It was properly held that rescission was the only remedy.

In *Burland v. Earl,* L. R. App. Cases, 1902, page 83, relied on by appellants, the principal question involved was whether corporate directors could be compelled to distribute as dividends accumulated profits in the absence of express power in law authorizing the corporate being to do so. Another question involved was whether a president, director and manager of the company, one Burland (who was a very large shareholder), having purchased *at public sale* a certain property from a bankrupt concern, of which he was also a stockholder and creditor, could afterward resell the same property to the company at an enhanced price.

As respects this latter question, it was contended that since he resold at an advanced price he should account for the profits.

The court say (p. 98):

> "It appears from the evidence of respondent Earl, who was then the next largest shareholder to Burland and a director, *that he was present at the sale and knew all about the transaction*, and from the evidence of Gillelan (also a director) that he knew what Burland had paid '*very shortly after.*' There was evidence of two witnesses * * * that the price to the company was not unfair."

There was no obligation on the part of Burland to give the company the benefit of his bargain, and no concealment respecting who was the vendor.

The court say further (p. 99):

> "It may be aslo that a person of a more refined self-respect and a more generous regard for the company of which he was president would have been disposed to give the company the benefit of his purchase. But their lordships have not to decide questions of that character. The sole question is whether he was under any legal obligation to do so."

The case was utterly devoid of any element of intentional concealment or continuing fraud, and Burland's dealing was with property in which the company had no possible interest whatever prior to its purchase of the same from Burland.

In the *Great Luxembourg Ry. Co. v. Magnay*, 25 Beavens Rep., 586, cited by appellants in support of this proposition, the facts were that a railroad company furnished its president and director a sum of money to enable him to purchase for it a concession for another line of railway. He purchased it and the company afterward discovered that he purchased it from himself. The company, by its bill, repudiated the contract and demanded the return of its money.

While the suit was pending, however, *it sold the concession to another for a large sum of money.*

Held, it was not entitled to the relief prayed, since it must return the concession to the defendant, and having made that obviously impossible *by its own act,* equity would not restore to plaintiff the money and allow the defendant to go from court without his concession.

Relief was denied by the court *solely by reason of this sale during the progress of the suit.* No question of the plaintiff's right to an accounting (except as barred by that sale) was even raised.

The master of the rolls, speaking of the relation of a director to his company, in the course of the decision, says (p. 592):

> "He is, in point of fact, not merely a director, but he also fills the character of a trustee for the shareholders, and he is, in regard to all matters entered into on their behalf, to be treated as an agent; therefore, there attaches to a director, for the benefit of shareholders, all the liabilities and duties which attach to a trustee and agent. Accordingly, if a director enters into a contract for the company, *he cannot personally derive any benefit from it.*"

Since that is the situation in the case at bar, this case is authority against appellants.

The case of *Sunderland v. Kilbourn,* 3 Mackay, 506, cited by appellants to this proposition, was one entirely different in its facts.

In that case two companions, having decided to make speculative purchases of real estate in Washington, D. C., employed the firm of Kilbourn & Latta to negotiate the purchases, the purchasers themselves having first designated the properties to be negotiated for. One parcel so designated was known as "Square 115." It so chanced that *prior to this time Kilbourn & Latta had become the virtual owners of this parcel at $40,000.* Without disclosing their interest, they reported $65,000 as the lowest price

on this square. The purchasers, *on their own judgment,* purchased at that price.

This was the main item of complaint in a bill for an accounting afterwards filed against Kilbourn & Latta. It was held that since Kilbourn & Latta were the owners, they could fix any price they pleased; that because of their misconduct in omitting to state their true interest in the property offered, Sunderland and associates might have repudiated the purchase and recovered the purchase price, but that they could not retain the benefits of the bargain which Kilbourn & Latta had made for the property *long before the agency began.*

In relation to the one item where the agents purchased at 40 cents per foot, and turned it over to their principal at 50 cents per foot, *both after the agency was created,* the court held that the agents must account for their profit, even though the agents had been told that the principal was willing to give 50 cents per foot. Respecting this and certain other secret profits made by the agent, the court say (page 518):

> "An agent is not to be encouraged in devices to make profits secretly out of the business in which he is engaged as against his employer."

This holding was affirmed on appeal, 130 U. S., 505.

The case of *Bristol v. Scranton,* the decision of which in the lower court is reported in 57 Fed., 70, and on appeal in 63 Fed., at 218, is relied on by appellants as in point. An examination of the facts, however, shows it to be quite otherwise. In that case two rival steel companies conceived it to be mutually advantageous, because of active, if not hostile, competition between them, to consolidate and eliminate competition.

The two Scrantons, respectively president and vice-president of the Scranton Company, and men of skill in the

steel-making business, were required by the Lackawanna Company, with which the Scranton Company was proposing to consolidate, and as a condition to the consolidation, not to directly or indirectly engage in the steel business in the northern United States for ten years.

The evidence showed that Walter Scranton was sales agent of the Scranton Company at a salary of $9,000 and a small additional percentage on net earnings. William was manager of the Scranton Company at a salary of $7,500, with a like arrangement as to net earnings.

The uncontradicted evidence was that ordinary yearly salaries of expert managers and salesmen of such steel works ranged from $12,000 to $20,000. The Scrantons regarded this covenant not to so engage for said ten years, so required of them, as involving great personal sacrifice; with William it was a question of laying down his life's work.

William consulted Henry Belin, Jr., a stockholder and active director of the Scranton Company, as to what he ought to get, and was told

> "that the way to arrive at it was to capitalize his salary. That would give him the figure he ought to sell out at."

Concealment was neither practiced nor attempted. The price agreed to be paid them for thus refraining was $350,000 in bonds.

Held, that their interest, *not thereby being rendered antagonistic to the corporation,* they were not bound to account for the money thus received for their agreement to keep out of competing steel manufacturing for ten years.

In deciding the case at circuit, the lower court said (page 79):

> "In no proper sense were the bonds in controversy a profit made out of the agency or fiduciary relationship which here existed. They were not a gratuity, nor were they paid to the Scrantons because of their

fiduciary position. They were paid and received upon a valuable consideration moving wholly from the Scrantons individually. The Scranton Steel Company had no claim to the future services of the Scrantons. Their time belonged to themselves. The bonds were no part of the consideration to which the Scranton Steel Company was entitled. *The two contracts were distinct in parties, subject-matter and consideration.*"

On appeal, the court of appeals say (page 221):

"In our opinion, the transaction, as consummated, so far as the consolidation of these two companies is concerned, is not tainted by a scintilla of fraud on the part of the defendants. *It was conducted openly and fairly;* was brought in its earlier and later stages to the knowledge of a very large number, if not of all, the stockholders interested, who were represented by the defendants; and the terms of the consolidation, as finally agreed upon, when submitted to the stockholders of the Scranton Company, *including the complainants,* was approved, not only with entire unanimity, but, as well, as a great 'triumph.'"

Speaking of the rule under discussion in the case at bar, the court say:

"Undoubtedly, it is a rule of the broadest application in equity that no one who has fiduciary duties to discharge shall be permitted to enter into contracts or engagements, *in which he has a personal interest, which actually do conflict or may conflict with the interest which he represents, and which he is bound to protect.* To uphold such proceedings—to justify such conduct—would be contrary to public policy. The law does not permit fiduciary agents to subject themselves to temptation to serve their own interests in preference to those of their principals. An agent's interest and an agent's duty must be coterminous and harmonious. These principles are perfectly well settled. If they ruled this case there would be—could be—no defense. But the answer to this contention of the appellants is to be found in the necessary lack of application of the principles stated to the facts of the case. The evidence makes it very clear that this *personal contract of the de-*

fendants, so strenuously objected to by the appellants, *was not based upon the successful accomplishment of the consolidation, nor did it spring from it.*"

Here, in both the making of the lease and for many years afterward during the enforcement of its terms, Directors Mather and Hayden were agents on both sides and their interest for their independent principal was in sharp conflict with their duty to the Arctic, or might be so at any time.

It is not difficult to guess what that court would have done had the case at bar been before it instead of the case it actually had for decision.

In all the cases above reviewed, except the last, it is to be observed that the vendee, acting where rescission is possible, may rescind because his agent to purchase did not disclose that he was selling his own property, but the vendee cannot ratify and ask the agent to account for the difference between what the agent paid and what he received, since the agent was selling his own property and had a right to either the price bargained for or the return of the property.

5. After quoting from the cases we have discussed, counsel urge that there is no difference in principle between this case and the cases which they have cited and which we have discussed.

We contend that the principle of those cases does not apply to this case.

The bill tendered all sums equitably due on an accounting as the legitimate cost to appellants (finding No. 13). It does not appear from the finding that all the cost so tendered was not allowed in the accounting, as the whole record has not been certified. It is distinctly found in finding No. 13 that the $112,500 paid by the Cliffs for its share of the capital of the Regent was credited to the Cliffs in stating the account. This being so, there is no presumption that all other sums equitably due were not accounted

for. If the so-called "rights" were of any substantial value, such value appellants were entitled to prove, and on this record it must be presumed to have been allowed to the Cliffs in the accounting. If they were so allowed, that is all the Cliffs can ask, when the real consideration for the secret bargain is borne in mind.

Again: By turning in some of his own property with the property of his beneficiary, a trustee does not avoid liability to account for the profits arising to him out of his transactions with his beneficiary's property.

Mr. Mather accepted, before it was due, a large amount of money, to save himself from all possible loss on account of his loan. He got a responsible concern to assume the traffic contract, and succeeded in having Hayden and himself retained for many years as Arctic directors, while they remained agents of the Cliffs, then drawing profits under the lease, all as an incident to putting Cliffs in a position to get the secret profit out of the lease. After the bargain he allowed to be made by the Arctic, Cliffs is asked to account for the profits it made from the ore procured after the lease was made (by reason of the secret bargain). He cannot, we submit, be excused from this accounting by reason of the fact of his acceptance of the money and surrender of the pledged leases securing its payment. By putting some of his own property into the deal, he cannot escape liability to account for the secret profits made by him from the way in which he dealt with the Arctic's property.

There need be no confusion between the "interest" and the "contract" and the "lease," as suggested on page 34 of the brief, except as counsel, for the sake of their argument, seek to create such confusion.

To follow up the illustration used by counsel in this connection (at the bottom of page 35), we are not here seeking to recover $50,000 supposed to have been paid by the Oliver to the Cliffs for the surrender of rights. On the contrary, if anything was equitably due in that regard, it was tendered in the bill.

6. On pages 35 and following, it is argued that the bargain was ratified by the course pursued in 1904, after the deception had been discovered, and this is upon the theory that a separate consideration moved from the Cliffs to the Oliver.

Did that consideration empower Hayden and Mather to act for both lessor and lessee in administering the lease?

Again: It obviously is not true that the decree of the district court allowed the plaintiff to confiscate property rights held by the Cliffs in 1899, since the real consideration which moved to the Cliffs to abandon its objection to the lease to the Oliver was the promise of the ore, which, after the lease was made, it got, with the resulting profits within the period covered by the accounting, viz., nearly $900,000.

7. Having discussed the principal points made in this branch of appellants' brief, we desire to submit one or two further considerations.

The pledge, in any event, would have been surrendered if any new lease had been made.

If Mr. Mather had got a lease, as he sought to do, he would have been obliged to surrender the pledge, as he did after he assented to the Oliver lease. He greatly desired to get a lease for the Cliffs. To get it, the old leases must have been got out of the way, either through forfeiture by the lessor for non-payment of royalty, or by an acceptance by the lessor of the surrender. In case of forfeiture, Mr. Mather's collateral, so far as the leases were concerned, became valueless. In case of the acceptance of a surrender, he must have given up his pledge and stood a loss.

The remark of the district judge who originally heard the case is sound:

> "The case is no different in this respect than if defendants, instead of giving up their own claim,

had, by the use of their own money, purchased the surrender of a claim held by a third person. In either case, the cost or expense would be, upon an accounting, a proper item of cost of obtaining the lease."

What was given up was of merely speculative value. The Cliffs received the money it had loaned, and a novation of the traffic contract with a responsible concern. It gave up the pledge of the leases, which, if the pledge had been foreclosed, would have made it the lessee of a mine burdened with a prohibitive royalty. If the pledge had not been forfeited, the Cliffs could only have received $250,000, and this it got.

8. Rescission was not practicable in 1904. The parties could not have been placed in *statu quo*.

The certificate does not disclose any facts from which this court could find a rescission to have been possible at the time this suit was instituted. It does show that on the payment of the money due the Cliffs the traffic contract was transferred to the Oliver Company, and the new leases were made too, and by that company assigned to the Regent Company. What became of the old leases is not clearly shown; obviously they were canceled. In what manner the court could restore the debt of $250,000 paid; revive the old leases, from the obligations of which Corrigan had been released; compel him to return the price paid therefor; revive the Queen Company, if it has gone out of existence, and compel it to again take up its burdens under those old leases and again assume the traffic contract, are matters upon which we have no finding of fact, and respecting which we cannot indulge in speculation.

The answer to Question 1-b should be, "No."

III.

The doctrine of unclean hands does not bar recovery in this action.

Questions 2-a and 2-b.

2-a. Does the conduct of Kaufman and Breitung, in insisting upon benefit to their outside interests as a condition of their consent to the lease, bar them, in their own names or in the name of the Arctic, from complaining in a court of equity of the conduct of the Cliffs, in insisting upon benefit to its outside interests as a condition of its consent to the lease? Or,

2-b. Did their conduct pertain to a matter so distinct from that conduct of the Cliffs, of which they complain, that the rule of clean hands does not apply?

These questions may properly be considered together.

We contend:

(1) That this action was properly brought by and in the name of the Arctic Iron Company, and that there is no basis for charging that company with lack of equity; but

(2) That if the bill is to be regarded as having been filed by Kaufman and Breitung, there is no ground in the record for charging them with coming into equity with unclean hands.

It is undisputed that the Arctic Iron Company is a Michigan corporation, and that at the time the bill was filed Mrs. Kaufman was its president. The membership of the board of directors has been already stated.

1. The judges of the district court have held that the bill was properly filed by the Arctic Iron Company, through its president, or the case would not be here in its present form.

If it was properly brought by that company, the questions propounded are not material, for there is no claim made that the company as such has done anything inequitable.

The authorities are numerous that:

> "The president of a corporation has authority to authorize an attorney to file a bill in behalf of a corporation to establish its rights."
>
> *American Ins. Co. v. Oakley,* 9 Paige, 496.
> *Potter v. N. Y. Infants' Asylum,* 44 Hun., 367.
> *Beebe v. Geo. H. Beebe Co.,* 64 N. J. Law, 97.
> *Southgate v. R. R. Co.,* 61 Mo., 89.
> *Reno Water Co. v. Leete,* 17 Nev., 203.
> *Davis v. Memphis Ry.,* 22 Fed., 883.
> *Streeten v. Robinson,* 102 Calif., 542.
> *Boston Tailoring House v. Fisher,* 59 Ill. App., 400.
> *Coleman v. W. Va. Oil Co.,* 25 W. Va., 148.
> *Recamier Mfg. Co. v. Seymour,* 5 N. Y. Supp., 648.

If the bill had been filed by stockholders in their own names, as what is commonly called a stockholders' bill, it would have been filed in the right and on behalf of the corporation, the rights of the corporation being worked out through the instrumentality of the stockholders. Confessedly, such a bill might have been filed, and if it had been, a decree would have followed in the district court of the same kind as was actually entered. It would have been an idle ceremony for Breitung and Kaufman to have applied to the board of the Arctic Company (themselves, Hayden and Mather) to file a bill in the name of the company for relief. If, under the authorities above cited, the president had not the right to file a bill in the name of the company, then a stockholders' bill in the right of the corporation, but in the names of Kaufman and Breitung as stockholders, would have been filed. In whatever name brought, the wrong complained of was a wrong to the corporation, and it, we repeat, cannot be charged with lack of equity.

It seems to be supposed, but it is not true, that this bill is filed for the benefit of Kaufman and Breitung. It is filed for the benefit of the corporation, which sustained the wrong, and if the decree of the lower court should be affirmed and the decree collected, the proceeds would belong to the corporation, to pay its debts and be distributed amongst the shareholders, or used otherwise as it might determine.

2. But if, by any process of reasoning, the bill can be considered as having been filed by Kaufman and Breitung as individuals, and not in the right of the corporation, still there is nothing in this record to warrant the conclusion that the plaintiff comes into court with unclean hands.

Kaufman and Breitung owned in their own right an undivided half of the fee proposed to be covered by the Oliver lease. The Arctic Company owned an undivided half. The lease was to cover both of the undivided halves of the fee. In closing the terms of the lease, Kaufman and Breitung insisted, as a condition of making the lease, that the Oliver should buy a one-quarter interest in their individual fee of one parcel for $131,500. The Cliffs learned of this fact, and agreed to buy from the Oliver one-quarter of this fee or one-sixteenth of the total fee for one-quarter of the price paid for it by the Oliver. The price received by Kaufman and Breitung was (according to findings of the court) twice the then fair value of the interest purchased. In accounting, however, the amount paid, as aforesaid, by the Cliffs for its one-sixteenth of the fee was credited to it (see finding No. 14).

It is to be observed that Kaufman and Breitung, as regards their undivided one-half fee, were making the lease for themselves individually, and that it was from this, their own fee, that they sold the interest to the Oliver in one of the leased parcels. As respects this individual fee, and the disposal of it, no claim is made that they owed any obligation to the Arctic save as one tenant in common owes a duty to the other, and this is true as regards that part of their individual fee which they were leasing.

Since they were directors of the Arctic, they did owe to that company the duty not to permit their dealings with their own as its co-tenant to interfere with their duty to it as its directors, which duty required them to make for it the best bargain they could and to use all their skill and acumen to that end, and not to put themselves in a position of continuing hostility to its interests. Faithfully discharging these obligations, the fact that they were Arctic directors could not, *per se*, take from them their well-settled co-tenancy right to sell when they pleased, to whom they pleased, and at the best price they could obtain, any part of their individual property, whether held as tenant in common with the Arctic or not.

The court finds (finding 12):

> "Kaufman and Breitung insisted upon many concessions, and in the end procured the best terms *in all respects for the Arctic*, that could have been procured from the Oliver, or from *anyone*."

Again:

> "At the time, *good business judgment* dictated the acceptance by the Arctic of the proposed new lease on the terms offered by the Oliver." (finding 8).

The court finds, in the same connection, that the Cliffs offered the same terms as the Oliver and a bonus beside.

We discuss the wisdom of accepting the Cliffs as lessee in preference to the Oliver and the respective offers made elsewhere in this brief, and do not here discuss it, further than to say that it becomes apparent on a mere glance that on the facts *then known* to Kaufman and Breitung the Arctic could not have leased to the Cliffs on the better paper terms offered by it without *at once* putting one-half of the Arctic directorate and its secretary (Hayden and Mather) on both sides of the lease, since Mather was then known to be stockholder, president and treasurer of the Cliffs, and Hayden to be its attorney.

Thereupon, their interest as representatives of the Cliffs—lessee—would clash with their duty to the Arctic—lessor—

so soon as any question respecting payment of royalty or minimum, of the manner of working the mines, or grading the ore, or, in fact, the enforcement or observance of any other covenant of the lease, should arise.

It is found as a fact (certificate, page 2, top) that the arrangement of directors and officers in the Arctic was made

> "to effect a *perfect balance of power between the two interests,*"

and

> "this make-up of officers and directors continued thereafter (after the election of Mather and Hayden) without change" (certificate, page 4, top).

It is found as a fact (certificate, page 8, top) that Kaufman and Breitung

> "were men of great business experience and ability in all matters pertaining to iron ore."

No doubt this experience and ability influenced them to an even greater extent than it would men of less experience and ability to clearly understand and appreciate that a lessee (the Cliffs) whose president and attorney composed one-half of the lessor's directorate, *no matter what the paper terms of the lease were,* was both dangerous and undesirable as a lessee, and this consideration no doubt caused them to decline the nominally better terms offered by the Cliffs in favor of a stranger (the Oliver), against whom they believed (being ignorant of the secret agreement) the lease *as written* could be strictly and promptly enforced by the Arctic, free from embarrassing entanglements in its own directorate. Had they known that the Cliffs was to occupy a lessee position in any event, they might have decided with propriety that it was better to have the paper lease, offering the better terms. Appellants can scarcely complain, however, because their efforts at concealment did succeed, or because Kaufman and Breitung did refuse, *on the facts then known to them,* to put complainant at the mercy of its adversely interested agents and officers for the sake of a promised additional bonus,

and to that extent did not make for the Arctic the best paper lease possible.

The sale by Kaufman and Breitung of this, their individual fee, in no manner influenced adversely the bargain they procured for the Arctic. It was a sale of distinct and separate property from the Arctic's, which Kaufman and Breitung owned individually—a sale to a third party.

The arrangement whereby the Cliffs agreed to acquire one-quarter of the fee the Oliver got was, like the rest of the secret arrangement between those companies, concealed from Kaufman and Breitung, although fully agreed upon before the execution of the lease (finding No. 14). Kaufman and Breitung did not know that the Cliffs would be interested in the sale of their individual fee to the Oliver, and did not themselves acquaint the Cliffs with that fact.

In order to bar relief on the ground of unclean hands, there must be some iniquitous conduct or purposeful concealment, or lack of good faith.

In this case there was no breach of any duty owing by Breitung or Kaufman to the Arctic. They were not dealing with its property, nor was there any purposeful concealment by them of what they had done.

They intended no harm to the Arctic, and in fact no harm resulted from the sale.

By the sale Kaufman and Breitung were not placed in a continuing position of conflict between interest and duty, as was Mather after getting secretly his interest in the Oliver lease. The well-settled co-tenancy rights of Kaufman and Breitung to sell their individual property when and to whom and at what price they pleased was not affected by their election as Arctic directors. Had they attempted to deal in its property or to sacrifice its interests to advantage themselves individually, a different question would be presented.

This sale was a distinct dealing with their own property. What they did with their own property was no concern of the Arctic, so long as they scrupulously discharged every duty they, as directors, owed to that company. Every such duty was thus discharged by their getting for it the best lease it was possible to get from anyone, since no conflict was thereby raised between their duty to it and their self-interest.

If they had insisted on selling part of their fee to the Arctic for a price much less than the then market value of the land, would the appellants insist that they were morally delinquent? Is the complaint at bottom based on the price which they got? If it is, we call attention again to the fact that the price which the Cliffs paid was allowed to it in the accounting; that no injury was done to the Arctic and no moral delinquency was involved in the sale of their separate property in an arm's-length dealing with the Oliver for the sale of land at a price which was satisfactory to the purchaser.

This was a mining property (certificate, page 2, bottom), and subject to sudden and great fluctuation in value—perhaps greater than any other known class of property, unless it be oil-bearing lands.

> *Twin Lick Oil Co. v. Marbury*, 91 U. S., 587, at 592.
> *Johnston v. Standard Mining Co.*, 148 U. S., 360, at 371.

Likewise, no class of property probably presents more difficulties in arriving at a true estimate of its real value. None presents greater opportunity for *honest difference of opinion*. Well-informed men may honestly differ widely as to the extent and quality of the mineral deposits, the difficulties likely to be encountered in mining, and correlatively the cost of mining. Iron ore is a commodity with no fixed market value, but subject to the law of supply and demand, and likely to have wide fluctuations in market value from time to time. This is well illustrated as respects these very lands by the findings of fact (see No. 6, page 3 of certificate).

The law presumes all men to be honest and to act with good motives and rectitude of purpose until the contrary appears. There is no finding that Kaufman and Breitung considered the land of less value than the price asked, or that they acted in bad faith.

The findings show that as late as 1913 these lands were still producing. To hold that Breitung and Kaufman should now be held moral delinquents for not having made a wiser guess as to the value, in 1899, of these mineral lands, still developing and producing as late as 1913 (certificate, page 7, middle), and to say that on so flimsy a foundation the complainant corporation be now sent remediless from court, is, we believe, carrying the doctrine of unclean hands far beyond the extreme limits of its just function.

The claim that they were guilty of bad faith has no real foundation in the facts.

(1) In order to bar relief on the ground of unclean hands, the wrong must have an immediate relation to the equity for the enforcement of which plaintiff prays.

There is here no such relation. The basis of the plaintiff's claim here is the bargain made between the Oliver and the Cliffs, without the plaintiff's knowledge, before any arrangement looking to the sale of the fee was made between Kaufman and Breitung on the one hand and the Oliver on the other. The misconduct of Kaufman and Breitung, if any, had nothing to do with the arrangement already reached between the Oliver and the Cliffs, and had no bearing at all upon the transaction of which complaint is here made.

(2) In order to bar relief on the ground of unclean hands, the wrong must have been done to the defendant and not to some third person.

If any wrong was done at all, it was by Kaufman and Breitung selling at too high a price certain property to the Oliver, although the Oliver was willing to pay the price. The defendants here are concerned in the matter only be-

cause later, by an independent arrangement with which this plaintiff had nothing to do, it bought a part of the property thus sold to the Oliver at a proportionate price to the alleged excessive price.

The money so paid by the Cliffs has been allowed to it in the account. It cannot be heard, by reason of these facts, to say that as to it the plaintiff here is in court with unclean hands.

General iniquitous conduct, reprehensible acts toward third parties, do not deprive a suitor of his rights in a court of justice.

Wrongful conduct in the very act or matter which constitutes the complainants' ground of action, and that alone, will repel from a court of equity on the ground that "he who comes into a court of equity must do so with clean hands."

This rule does not disqualify any complainant from obtaining relief who has not dealt unjustly in the very transaction of which he complains.

Bispham Eq., 61.

The following cases are illustrative on this subject:

In *Bateman v. Fargason*, 4 Fed., 32, a bill was filed to set aside a settlement of, and eliminate usury from, an account which had been paid by a transfer of land. In the bill complainant confessed that he had coerced his wife to sign the deeds. Demurrer was interposed on the ground that he came with unclean hands.

Held that this coercion would not repel him from a court of equity.

The court say (p. 33):

"The plaintiff will not be repelled unless the iniquity complained of in him is connected with and a part of the very transaction as to which he seeks re-

lief. It seems to me plain that, while the coercion of the wife was a method of perfecting the defendant's title to the land, and, in that sense, connected with the transaction, it is not a part of it."

In *Trice v. Comstock,* 121 Fed., 620, unclean hands was not the principal question, but was involved, and upon that subject the court (at page 628) used substantially the language above quoted.

Shaver v. Heller Co., 108 Fed., 821, was an injunction suit to restrain defendants, among other things, from the use of the terms "American Ball Blue" and "American Wash Blue," in connection with goods manufactured by defendants, since those terms had acquired a certain meaning by use in connection with the goods manufactured and sold by complainants.

Held, such use constituted a fraud and would be restrained as such. One defense urged was that complainant was in court with unclean hands, since the complainant itself had for some years previously been manufacturing and selling bluing under the names "Germania Ball Blue" and "Bavarian Ball Blue," in boxes simulating foreign products.

The court say (p. 834):

> "Counsel for appellants insist that these names were false and misleading, and that the appellee was entitled to no relief from a court of equity, because it did not come with clean hands. The principle that 'he who comes into equity must do so with clean hands,' is familiar and indisputable. But it does not repel all sinners from courts of equity, nor does it disqualify any complainant from obtaining relief there who has not dealt unjustly in the very transaction concerning which he complains. The iniquity which will repel him must have an immediate and necessary relation to the equity for which he sues. * * * There is no evidence that the appellee has been guilty of any injustice, fraud, or wrong in acquiring the good will of its business in the "American Ball Blue" and the "American Wash Blue," which is the subject of

this suit, or in its relations with appellants, and relief cannot be denied to it because it may have been wicked in other transactions which affect neither the appellants nor the equity here under consideration."

In opposition to a bill filed to restrain a benevolent society from using a name substantially like that of an existing organization, it was claimed that one of the complainants had been guilty of certain delinquencies in relation to the Order in whose behalf the bill was filed. These delinquencies had no necessary relation to the equities of the bill; nor was there evidence that they induced the unlawful action of the defendant.

The circuit court of appeals for the 9th circuit held that the maxim about clean hands had no bearing upon the controversy, and said (p. 662):

"That principle does not repel all sinners from the precincts of courts of equity, nor does it disqualify any plaintiff from so obtaining full relief there who has not done iniquity in the very transaction concerning which he complains. The wrong which may be invoked to defeat him must have an immediate and necessary relation to the equity for the enforcement of which he prays." Citing many authorities.

Talbot v. Independent Order of Owls, 220 Fed., 660.

The supreme court of Michigan has rather recently had occasion to lay down and apply the rule that the application of the maxim as to unclean hands is limited to the defendant in the litigation; that the wrong must have been done to the defendant himself and not to some third party, and that even if the complainant was guilty of any fraud or wrong doing against a third person, he could not be barred of relief in equity if he perpetrated no iniquity against the defendant.

Cochrane Timber Co. v. Fisher, 157 N. W. Rep., 282 (Mich.); Mar., 1916.

In view of the facts and the law, the claim that the plaintiff comes into court with unclean hands and so may not have relief, is clearly untenable.

To state the proposition seems to us to answer it. The sale of the land and the making of the lease, were two contracts, distinct in parties, subject matter and consideration, and the former involved no moral delinquency and contravened no undischarged obligation which they owed to the Arctic.

They sold openly, that which was theirs, to the Olivers. The appellant, Mather, while openly executing the lease as secretary of the Arctic (lessor) with his right hand, secretly with his left seized a lessee position for Cliffs, his independent principal under that same lease.

After the execution of that lease and the making of that sale, they held, personally, no interest calculated to adversely influence their action as Arctic directors. After that transaction, Mather and Hayden, Arctic directors, also president and treasurer and attorney, respectively, of the Cliffs, had *deliberately and designedly* placed themselves in a position of *continuing conflict* between their open duty to the Arctic as its trustees and their secret lessee interest against it, and that situation continued (Cert., page 4, top). There is no similarity between the two transactions.

On these questions the brief of appellants urges, first, that this is not a suit by a corporation, but by Kaufman and Breitung. This we have discussed in the earlier part of this division of our brief. It is not, we think, necessary in this court to urge now that an application to the board would not have been necessary before filing a bill in the right of the corporation, but in the name of the stockholders, when such application would have been, to use the language of Judge Lurton, "an idle form."

Rogers v. Nashville Etc. Ry. Co., 91 Fed., 306.

See also:

Haas v. Damon, 9 Iowa, 589.
Hill v. Hunt, 9 Gray, 66.
Wait v. Gibbs, 7 Pick., 146.

It is argued that the court below has reached a conclusion on this point because of certain language, which counsel has quoted from the certificate. It seems hardly necessary to reply to this suggestion. It is a mere guess.

Toward the end of this portion of the brief, numerous authorities are cited as to what the maxim about clean hands means.

We have called attention to authorities which clearly show that the maxim has no real application to this case. The gist of the whole argument of the appellants is that Kaufman and Breitung are the real complaining parties and were guilty of a like wrong to the Arctic in the same transaction which they charge against the defendants.

Kaufman and Breitung did not get a personal benefit out of the property of the Arctic and did not violate any duty toward the Arctic. Their conduct pertained to a matter entirely distinct from the conduct of the Cliffs, of which they complain. They made the very best bargain which could be made for the Arctic and dealt with a third person in reference to their own independent property, in a way satisfactory to that third party. They did not raise a conflict between self interest and their duty toward the Arctic. They concealed nothing by means of secret bargains. Mr. Mather did precisely the opposite. He secretly bargained for an interest in the lease of the property of his principal, the Arctic Company. He set up a continuing conflict on the part of himself and Hayden between the duty they owed as Arctic directors and the interest they represented as Cliffs agents. He kept this conflict secret from his duped associates on the Arctic board while his independent principal, Cliffs, profited or was in a position to profit, from his duplicity.

IV.

Kaufman and Breitung not bound to inquire whether the Cliffs-Oliver agreement pertained to lease itself.

Question 3-a.

When Kaufman and Breitung were informed that the Cliffs had reached with the Oliver such an agreement that the Cliffs was willing to withdraw further objection to the Oliver lease, were they then and there bound to inquire as to the terms of such agreement, and when they did not, but proceeded without inquiring, did they thereby so far acquiesce in whatsoever terms were included in the agreement that a court of equity will not entertain their later complaint? or,

Question 3-b;

Were they justified in assuming that the agreement did not pertain to the lease itself, but to some outside matters of conflicting interests between the Cliffs and the Oliver?

When Breitung and Kaufman were informed that the Cliffs had reached such an agreement with the Oliver that the Cliffs was willing to withdraw further objection to the Oliver lease, they were not bound, at their peril, to suspect Mather and the Cliffs of collusive secret dealing, but had a right to assume that they were dealing honestly and in good faith. Since Mather had no *apparent interest* in the proposed Oliver lease except as trustee for the Arctic, and the Cliffs none except as stockholder in the Arctic, they had a right to assume that the Cliffs had reached an agreement with the Oliver respecting payment of its loan, for the payment of which the old Queen leases were pledged.

Certain facts found are important to a thorough understanding of this question.

1. In February, 1898, Kaufman and Breitung were notified by the Cliffs that it had become interested in

the Queen leases, and desired notice in case the lessor made any change or the lessees made any default (Cert., page 3, middle).

2. November 30th, 1898, the Cliffs purchased one-half of the Arctic stock, and of this purchase Kaufman and Breitung were at once notified. On December 30th following, Mather and Hayden were elected Arctic directors and Mather was made secretary of the Arctic (Cert. page 3, bottom; page 4, top).

3. After the Cliffs had been refused a lease, Cliffs and Oliver, at the instigation of Corrigan, took up negotiations between them to see if Cliffs could not be induced to withdraw its objection to the Oliver lease. The result was the secret dealing whereby it obtained a one-quarter lessee position under that lease (Finding 9).

4. Thereupon Kaufman and Breitung were informed, either directly or indirectly, that an agreement had been reached between the Oliver and the Cliffs, *because of which* the Cliffs would no longer object to the Oliver lease (Finding 10).

5. Kaufman and Breitung were not informed, and did not know until years later, that the secret bargain had been made. The Cliffs knew that if so informed, or if informed of any fact from which they would discover that fact, they would refuse to go on (Finding 11).

Both the Cliffs and the Oliver took pains to conceal, and did conceal, their secret agreement, so that Kaufman and Breitung should not and did not discover the same (Finding 11). As a part of that concealment they sedulously refrained from, and did not inform Kaufman and Breitung in any manner of the *traffic contract*, or of the pledge of the Queen leases to the Cliffs for the faithful performance of *that agreement*. To have done so would have been to take the risk that Kaufman and Breitung would discover the use the Cliffs now claims to have made of its pledgee position.

6. The Cliffs "was of the highest standing, both financially *and for integrity and fairness*" (Cert., page 4).

This known reputation and the notice which the Cliffs gave Breitung and Kaufman in February, 1898, above noted, that it had become interested in the Queen leases, enabled the Cliffs to give the misleading and cautious notice found in the Certificate (page 5, middle), that "*an agreement had been reached between the Oliver and the Cliffs because of which the Cliffs would no longer object to the Oliver lease,*" with good ground to believe that Kaufman and Breitung, in view of its high standing for integrity, and, the notice of February, 1898, *would fail to suspect it* and its president and attorney of double dealing, and that they would at once conclude that it had decided that the Oliver offer, plus such improvement in terms as the Arctic, through Breitung and Kaufman, could get from the Oliver, would satisfy it, as an Arctic stockholder and controller of one-half the Arctic directors, to take the lease.

"At the time good business judgment dictated the acceptance by the Arctic of the proposed new lease on the terms offered by the Oliver" (Cert., page 5, near top).

Two additional facts are of importance in this connection:

(a) Kaufman and Breitung were large owners of iron lands and "men of great business experience and ability in all matters pertaining to iron ore" (Finding 16).

(b) "In 1897 and 1898 market prices for iron ore were low. The Queen could not pay the agreed royalty or meet the minimum without loss and the lessors (Breitung and Kaufman, the Arctic Co., and others) had, from time to time, accepted less than the agreed rates, rather than forfeit the lease" (Cert., page 3, middle).

With these apparently next to worthless leases pledged as security for the Cliffs loan of $250,000, and this fact known to Breitung and Kaufman, they had a right to believe, as

they did believe, that the Cliffs, with its splendid reputation for integrity and fair dealing, meant, when it notified them that it withdrew objection to the Oliver lease, that it was glad to get its poorly secured loan and interest, and at the same time, as an Arctic stockholder, was glad to get such a lease as good business judgment dictated this to be.

They now claim that because Kaufman and Breitung relied on the Cliffs' splendid reputation and the facts then known to them, and so relying, failed to suspect it and its president of collusive secret dealing; that that president, who was also director of the Arctic, could collude with the Cliffs to bring about its secret ends for their joint benefit, and then shield themselves behind the Arctic's failure to penetrate the deceit.

Kaufman and Breitung were fully justified in assuming that the agreement referred to in the notice pertained to the payment of the loan or some matter outside the Arctic, and did not pertain to the lease itself, and assertion to the contrary comes with poor grace from appellants, whose deliberate course of conduct was intended to and did produce that assumption.

It was the duty of Mather to then disclose the truth to his *cestui que trust* instead of now complaining because sufficient suspicion was not aroused to cause it to penetrate his concealment.

Emma Silver Mining Co. v. Grant, 11 L. R. Chan. Div., 918.

Liquidators v. Coleman, L. R., 6; House of Lords, 189.

See *Jackson v. Ludeling,* 21 Wall., 616.

In *Emma Silver Mining Co.* case, one Grant, an investment banker, undertook to promote a company to purchase a mining property in the State of Utah, for which services and the selling of stock, obtaining directors, supporting the market for the shares, etc., he was to have 20 per cent commission from the vendors of the property.

This bargain was not disclosed in the prospectus. The arrangement was carried out, and, upon discovery, suit was launched. The issue was whether he should be allowed to pocket this profit so obtained without the knowledge of the company.

Held, he would not. In reaching a decision, Jessel, M. R., says (p. 936):

> "Let us see what the position of Mr. Grant was. He had a contract with Park and Stewart (representing the vendors) to buy the mine of them, and that they should sell it to a company of his nomination, and he formed the company to buy. Can he say after that, he is not in a fiduciary position within the authorities toward that company? It is clear that he cannot. Therefore, the only question is, whether he can make any profit at all *and not disclose it?* Upon that the authorities are quite plain.
>
> The moment a man is in a fiduciary position, however that fiduciary position may arise, before he can retain a profit to himself he must deal with his principal on the footing of making a full and fair disclosure of everything material in relation to the dealing or transaction in which he acts in the fiduciary capacity."

In the above case, a somewhat celebrated case, decided in the House of Lords, is cited and quoted from as well illustrating the rule. It is the case of *Liquidators Etc. v. Coleman* (L. R., 6; H. L., 189).

There Coleman was a stockbroker *and he told his fellow directors that he had an interest in the transaction. He did not tell them the extent of his interest*, and it was decided that, inasmuch as his fellow directors might have been under the impression that *he merely took his ordinary commission as a stock broker*, and thereupon confirmed the transaction, he was liable to refund all his profits, *because it turned out he had made a large and extraordinary profit beyond the usual commission of a stock broker*, and it was decided that he was compellable to state, not only that he had an interest, *but what interest it was*, before he could sustain the transaction.

The brief of appellants (page 46) admits that a beneficiary is not bound to suspect his trustee of misconduct, and may presume that he is acting fairly unless warned by actual knowledge, or by notice equivalent in equity to knowledge.

It is found by the court below that the plaintiff's officers had no actual knowledge of the existence or the terms of the secret agreement. It is urged, however, that they had notice of the existence of the agreement—what is spoken of as "aggressive notice."

There is nothing in the findings to support this contention.

The plaintiff's officers were advised that an agreement had been reached between the Oliver and the Cliffs, because of which the Cliffs would no longer object to the Oliver lease (Finding 10).

Nothing appears in the record to show that the plaintiff's directors were under any duty to suspect a secret bargain for an interest in the lease. If they were not bound to suspect the existence of such bargain, they were not bound to push inquiries as to the existence of such a bargain. There was nothing which came to their notice to lead them to suppose more than that some arrangement satisfactory to the Cliffs had been made as to the payment of the debt from the Queen and the release of the security which the Queen and Corrigan had given.

Counsel reiterate that there was an understanding or agreement that the stockholders of the Arctic should proceed independently in the negotiations, etc. This we have fully discussed under the heading of estoppel. It has no proper basis in the findings.

On page 47, counsel for appellants say that there can be but one answer to Question 3-a, either in its legal aspect or in its equitable aspect.

We agree that there can be but one answer. That answer must be "no."

There was, confessedly, concealment by Mather of the vital matter affecting the lease itself and the disposition of the ore belonging to the Arctic Company. Without this concealment, the court finds that the lease would not have been made. There was concealment of the dual position occupied by Hayden and Mather, while the Cliffs operated under it.

It is again insisted that what Mather did involved no fraud or dishonesty.

We insist that such concealment, whether consciously dishonest or not, was misconduct amounting to constructive fraud, at least, on the part of the trustee.

The sale of the independent fee of Kaufman and Breitung, alluded to at the end of this section of appellant's brief, obviously has no bearing on the question of notice of Mather's misconduct.

Appellants are obliged to rest their argument on these questions on ground such as we have briefly alluded to above. We submit that the grounds are insufficient to sustain the argument, and that plaintiff's directors were justified in assuming that the agreement of which they learned did not pertain to the lease itself, but to some outside matters of conflicting interest between the Cliffs and the Oliver, and therefore, that Question 3-a should be answered "no" and Question 3-b should be answered "yes."

V.

Mather's duty was to disclose the Cliffs interest in the proposed lease.

Question 4-a.

Under the existing make-up of the Arctic, did Mather, as one of the Cliffs' directors of the Arctic, owe any duty to the Arctic or to the Breitung directors thereof to disclose that he had an outside interest in a contract which was about to be made by the Arctic and which was in fact well advised and for the best interest of the Arctic? Or,

Question 4-b;

Was his directorship duty, under the existing relations of the two bodies of stockholders to each other and to the Arctic, and after he had offered to procure for it an even better contract, satisfied so long as he did nothing to promote the proposed contract and left the decision whether it should be made and the terms thereof wholly to the Breitung directors?

In view of the way in which the stock of the Arctic was owned, did Mather, director and officer of the Arctic, owe it a duty to disclose to it that by reason of his secret bargain the Cliffs was to have a lessee interest in the proposed lease, or was his duty performed if he left it to the other directors of the Arctic to say what the terms of the lease should be, after he had made his bargain with the Oliver?

Such seems to be the gist of the questions which it would appear may properly be discussed together and not separately.

In the discussion of Question 1-a, we have contended that (1) a director is a fiduciary; (2) he is accountable for secret profits derived by him in his dealing with the property of his corporation, and (3) that in this case the Cliffs is liable to account to the Arctic for the net profits made by reason

of the secret bargain made by director Mather with the Oliver.

Without repeating, we beg to refer at this point to the discussion and the authorities cited in connection with it.

In view of the law settled by the decisions above cited, the question arises whether the Cliffs may avoid an accounting for those profits because Mather, when he secured his desired advantage (before getting which he could and did block any lease at all), allowed Kaufman and Breitung to decide upon the terms of the lease as regards royalty, minimum, etc?

To ask such question is to answer it, unless the following facts make the settled principles, which we have stated, inapplicable to the controversy, viz.: that the two bodies of stockholders held equal amounts of stock, and that the directors were Mather, Hayden, Kaufman and Breitung.

We contend that these facts do not render the generally settled principles inapplicable to this case.

The Arctic Iron Company was formed in 1883, under the laws of Michigan. Its articles provided for four directors. It had charter power to engage in mining, either by itself or by lessees. Its actual business consisted of leasing portions of its property under customary mining leases and receiving royalties therefrom, although at first it did some exploration work. Healy and Edward Breitung bought in equal shares the land which was turned over to the Arctic in payment of its capital stock, and naturally each was entitled to half of that stock, and the stock was issued to Mr. and Mrs. Breitung and Mr. and Mrs. Healy in equal shares (Finding 1).

After many years the Cliffs bought the stock of Mr. and Mrs. Healy. About a month after the purchase, Hayden, Mather and Edward Breitung were elected, by the unanimous vote of all the stock, directors of the company, so that the board then consisted of those gentlemen and Mrs. Kauf-

man. Thereafter, Mrs. Kaufman was elected president, and Mr. Mather, secretary of the company.

These facts do not do away with the fiduciary relation sustained to the Arctic Company by director Mather.

We have stated that he was elected director by the unanimous vote of all the stock. Under the statute of Michigan permitting cumulative voting, he might have been elected a director even if the Breitung stock had not been voted in his favor. If he had been so elected, he would none the less have been in a trust relation to the company and all the stockholders. A director is a trustee not merely for the particular stockholders whose stock may have been voted for him, but for the company and all the stockholders.

1. The fact that Cliffs owned or controlled one-half of the stock, and that Breitung and Kaufman owned one-half of the stock, did not vest in each of the stockholding interests a title to one-half of the corporate property.

A corporation is a legal entity, separate and distinct from those who own its stock.

Its property and affairs cannot be handled or disposed of by its members—even by those owning its entire capital stock—in the absence of an enabling statute, but only through its officers, subject to the conditions prescribed by law. Cases cited:

Randall v. Dudley, 111 Mich., 437.
Rough v. Breitung, 117 Mich., 48.
Button v. Hoffman, 61 Wis., 20.
Humphrey v. McKissock, 140 U. S., 304.

To same effect see:

Chase v. Mich. Tel. Co., 121 Mich., 631.
Robinson v. Taber, 165 N. W. (Mich), 730.

In *Randall v. Dudley*, 111 Mich., 437, one owning every share of stock of a private corporation, sued in his own name on an account stated between debtor and the corpora-

tion. *Held*, he could not recover; that such succession to its interests must be alleged and proven.

In *Rough v. Breitung*, 117 Mich., 48, suit was launched by four stockholders in their own names, they owning every share of the capital stock of a foreign corporation and claiming to have sold their stock in, and the property of, the corporation to defendant.

Defendant claimed to have purchased the property of the corporation from the corporation, and not to have purchased the stock, which purchase he claimed was void because the corporation had failed to file a copy of its charter and pay the franchise fee required by law before it could make a valid contract.

One of the issues raised was whether the owners of its entire capital stock had sold and conveyed all its property. *Held*, they had not.

The court, speaking through Chief Justice Grant, say (p. 54):

> "Stockholders do not own the corporate property and cannot mortgage, sell or convey it. The title is in the artificial being called the corporation, not in the stockholders. Such property is not under the control of its stockholders, whether they act separately or collectively. *The laws under which these corporations are organized provide the agencies and methods by which their property can be sold and transferred.*"

In *Button v. Hoffman*, 61 Wis., 20, the court say:

> "These general principles sufficiently establish the doctrine that the owner of all the capital stock of a corporation does not, therefore, own its property, or any of it, and does not himself become the corporation, as a natural person, to own its property and do its business in his own name. While the corporation exists he is a mere stockholder of it and nothing else."

The case of *Humphrey v. McKissock*, 140 U. S., 304, in addition to containing a luminous statement of the principle here involved, casts a most interesting side-light on the case

at bar. There, as here, the argument was most ably presented, that in effect the corporation was a mere means of holding the title to the land and elevator. Counsel states his position in that case (page 310) as follows:

> "We are thus brought to determine whether a different conclusion (than that for which he was contending) is authorized by the fact that the property as a whole was *owned* equally by six separate railway companies, and their title thereto evidenced by equal amounts of the capital stock of the Union Elevator Company.
>
> The *form* of the Railway Company's ownership does not affect the rights of the mortgagee."

The action was in equity to foreclose a mortgage. The facts were that six railway companies combined to construct an elevator, to be connected with their respective roads, each to contribute equally toward its cost, and each to receive corresponding certificates of stock in a corporation (the Union Elevator Company) to be organized to take title to the elevator and construct it. This was done. *Held:*

1. That the interest of each company in it was as a stockholder in the company that constructed it.

2. That no one of the railroad companies had an interest in the property itself which it could mortgage.

3. That such stock would not pass to the mortgagee of one of the railroads under a general description as "an appurtenance to the road."

The court, speaking through Mr. Justice Field, says (p. 312):

> "That Railway Company had no interest which it could assign, the building belonged to the Union Elevator Company, and the Railway Company was entitled by its subscription, when paid, only to a certain proportion of its stock. Both the commissioner, and the court, in confirming the report and entering the decree mentioned, *seem to have confused the ownership of stock in a corporation with the ownership of its property.* But nothing is more distinct than

the two rights; the ownership of one confers no ownership of the other. The property of a corporation is not subject to the control of individual members, whether acting separately or jointly. They can neither incumber nor transfer that property, nor authorize others to do so. The corporation —the artificial being created—holds the property, and alone can mortgage or transfer it; *and the corporation acts only through its officers,* subject to the conditions prescribed by law.

In *Smith v. Hurd,* 12 Met., 371, 381, the relations of stockholders to the rights and property of a banking corporation are stated with his usual clearness and precision by Chief Justice Shaw, speaking for the supreme court of Massachusetts, *and the same doctrine applies to the relations of stockholders in all business corporations.* Said the chief justice: 'The individual members of a corporation, whether they should all join, or each act severally, have no right or power to intermeddle with the property or concerns of the bank, or call any officer, agent or servant to account, or discharge them from any liability. Should all the stockholders join in a power of attorney to anyone, he could not take possession of any real or personal estate, any security, or chose in action; could not collect a debt, or discharge a claim, or release damage arising from any default; *simply because they are not the legal owners of the property,* and damage done to such property is not an injury to them. Their rights and powers are limited and well defined.' "

Cases of like import might be multiplied indefinitely.

2. The existing make-up of the Arctic did not do away with the fiduciary relation which the directors in handling the company's affairs and dealing with its property owed to the corporation and its stockholders.

The fact that the stockholders owned the stock in equal shares did not make them co-tenants of the real estate owned by the company.

Mather's directorship duty to the Arctic was not satisfied by his offering to procure, on behalf of the Cliffs, a lease with the same minimum and royalty that was being offered by the Oliver and a bonus beside, and his subsequent non-participation in the dealings with the Oliver to obtain as good terms for the Arctic as was possible.

In passing, we feel bound to say that the offer made by him on behalf of the Cliffs was *on the face of the certificate, as a whole,* not as good an offer as that of the Oliver.

He was agent, president and treasurer of the Cliffs, as well as director and secretary of the Arctic. Hayden was attorney for the Cliffs as well as director of the Arctic. The Cliffs owned one-half the Arctic stock.

All these facts were known to the two remaining Arctic directors and owners of the other half of its stock. *No offer to step aside and permit the Arctic directors and stockholders not interested as officer and attorney of the Cliffs, to dictate the policy of the Arctic toward the Cliffs,* in case of dispute over the terms of, or the enforcement or collection of minimum and royalty under the terms of the proposed lease accompanied that offer.

Let us consider for the moment the position of the Arctic if such a lease was executed. With its lessee owning one-half of its capital stock, and the agent, president and treasurer, and attorney, of its lessee holding two of its four directorships, as the certificate shows they did, and continue to do (Cert., page 4, top), we submit that on the face of the certificate itself there were *the best of reasons,* based on good morals and sound public policy, to refuse to lease to the Cliffs and to accept the Oliver offer as the better contract.

The utter helplessness of the Arctic to act adversely to the interests of the Cliffs without that company's consent at any time, after making such a lease, is apparent from a mere statement of the facts found. Nobody knew when occasion for such action might or actually would arise (see Cert., page 3, middle).

The case of *Insurance Company v. Lockwood*, 166 Calif., 185, is a most interesting and instructive one on this subject. It appeared that one Briggs was president and director of the Insurance Company.

Before his election to such offices, the company had made a contract with the firm of Pratt & Grigsby, co-partners, under which they were to sell its entire capital stock, consisting of 100,000 shares, within a certain time and without expense to the company, and from the proceeds were to pay the company $13 per share for the first 50,000 shares sold, and $15 a share for the remaining 50,000 shares sold.

Three days after his election, Briggs secretly went to Pratt & Grigsby and demanded 22½ per cent of the net profits which they would make from the contract, threatening that in the event that they refused he would resign as president and would not render further service as such president in aiding them in the sale of such stock. Pratt & Grigsby, knowing that they could not sell the stock within the time limited without his co-operation, acceded to his demand and paid him 22½ per cent of their net profits. He then died. The company discovered the secret bargain and demanded from his executor the profits he had thus obtained.

The suit was then launched against the executors. The lower court dismissed the complaint as not stating a cause of action.

The supreme court, in overruling such judgment, states the case made by complainant, and remarks (p. 190):

> "It is well settled that any secret profit obtained by the president or a director of a corporation by reason of any violation or disregard by him of any obligations incident to the fiduciary or *quasi-trust* relations that he occupies toward the corporation and its stockholders, cannot be retained by him, but must be accounted for to the corporation (citing authorities). Such an officer * * * is obligated, *by reason of his mere occupancy of the office*, to act in all matters affecting the corporation and its stockholders,

solely with an eye to their best interests, unhampered by any private interest of his own.

'*By assuming the office* he undertakes to give his best judgment in the interests of the corporation in which he acts for it, unhampered by any hostile interest in himself or others. There is an *inherent obligation* that he will in no manner use his position to advance his own interests as an individual, as distinguished from that of the corporation' * * *.

He is not allowed to assume a position, * * * 'that is possibly adverse to' his 'fiduciary duty.'

It is universally held as a consequence of this doctrine that he may not on behalf of the corporation contract with himself as an individual, which of course includes contracting with others with whom he has an interest, without the full knowledge and approval of the corporation. * * * 'The philosophy of the rule is quite apparent, and its *inflexibility* is the strongest safeguard which the law can offer for the protection of the interests of the beneficiary.' "

The court then proceeds to point out the possible contingencies in which Briggs might have been called upon to act as an officer of the company in respect of the enforcement of the contract of Pratt & Grigsby in hostility to his interest therein as an individual, and then say (p. 192):

"They show sufficiently, we think, that in acquiring this interest in the contract of employment of Pratt & Grigsby, Mr. Briggs acquired an interest that was *possibly* adverse to his fiduciary duty. It was henceforth to his pecuniary interest to decide any question that might arise between the contracting parties in such a manner as would be most profitable to Pratt & Grigsby, rather than to the corporation. * * *

The rules we have referred to do not allow the president of a corporation to occupy such a position. For him to do so is a violation or disregard of the obligations incident to the fiduciary or *quasi trust* relation that he occupies. It matters not that the officer is entirely free from any intention to injure the corporation in the slightest degree, acting in fact in the highest good faith throughout, or that his actions really advantage the corporation. *No inquiry may be*

made into such matter. The inquiry in this regard is stopped when the relation is disclosed."

But returning to a consideration of the situation as it exists: Their fellow directors had a right to the counsel, advice and co-operation of Mather and Hayden, or at least *that they maintain a position which would enable them to give such advice, counsel and co-operation whenever called upon, at all times untrammeled by any hostile interest in themselves or others.*

The Arctic stockholders are not even claimed to have, as principals, jointly or severally attempted to enforce the Arctic's lessor rights under the lease. The directors alone could do that. In this respect they cannot be said, with even a show of plausibility, to be mere "rubber stamps" or "dry trustees." They had full, direct and continuing duty imposed upon them during every moment of the entire time. *This duty they violated every day they remained directors of the Arctic while their independent principal profited in its lessee position.* The Cliffs made improper use of Mather and Hayden, as directors, and of Mather as an officer of the Arctic, for its own profit. Just why the Arctic may not effectively complain of this wrong, appellant's brief does not make clear.

The secret contract interest of their independent principal being antagonistic to the free and impartial discharge of their official duties toward their *cestui que trust,* is denounced by the law as contrary to public policy, in the absence of the assent thereto of all the Arctic stockholders after full knowledge of the facts, and even if Mather did nothing to promote the proposed contract, but left its decision and the terms thereof wholly to the Breitung directors.

Zinc Carbonate Co. v. Bank, 103 Wis., 125; 79 N. W., 229.
Stewart v. Lehigh Etc. Ry. Co., 38 N. J. Rep., 505.
Aberdeen Ry. Co. v. Blaikie, 1 Macq., H. L., 461.
Beeson v. Beeson, 9 Barr., 279.
Timmie v. Kopmier, 156 N. W. (Wis.), 961.
West v. Camden, 135 U. S., 507.

Ex Parte Bennett, 10 Ves. Jun., 381.
Guernsey v. Cook, 120 Mass., 501.
Wilbur v. Stoepel, 82 Mich., 344.
Comstock v. McDonald, 136 Mich., 489.

In *Zinc Carbonate Company v. First National Bank,* 103 Wis., 125, wherein the facts are stated on page 33 in this brief, the question of secret profits obtained by those in control of a corporation, was involved. They attempted to interpose the silence maintained on their part when they should have spoken to shield themselves and their co-defendant, the bank.

Speaking of this feature of the case, the court say (p. 135):

> "If an agent merely neglects the principal's business, action or non-action of the former constituting such neglect, will be attributable to the principal. But the idea that an agent *can collude with a third person* to bring about such neglect *for the purpose of obtaining the principal's property for the joint benefit of the agent and such third person,* and then shield themselves behind the doctrine that neglect of the agent is neglect of the principal, is not worthy of serious consideration. A mere statement of it is sufficient to show its absurdity."

In *Stewart v. Lehigh Valley Railroad Company,* 38 N. J. Rep., 505, the supreme court passing upon the question of the validity of a contract made in behalf of the corporation in which a director has an interest as against the corporation, uses the following language (page 523):

> "It matters not that the contract seems a fair one. Fraud is too cunning and evasive for courts to establish a rule that invites its presence. There may be isolated cases in which the trustee is willing to make a contract on more favorable terms for the *cestui que trust* than anyone else, but the opportunities for self-advancement, at the expense of those whose concerns he has in charge, and under circumstances where concealment is easy, are so much more numerous than these isolated cases, that in declaring a rule the latter are not worthy of consideration. Nor is it proper for one of a board of directors to support his

contract with his company, upon the ground that he abstained from participating as director in the negotiations for and final adoption of the bargains by his co-directors, *the very words in which he asserts his right declare his wrong; he ought to have participated, and in the interest of the stockholders, and if he did not, and they have thereby suffered loss, of which they shall be the judges, he must restore the rights he has obtained—he must hold against them no advantage that he has got through neglect of his duty towards them.* Many authorities exemplifying the rule may be found." Citing among other cases, *Michaud v. Girod*, 4 How., 503, and *Aberdeen Ry. Co. v. Blaikie*, 1 Macq., H. L., 461.

In *Aberdeen Ry. Co. v. Blaikie*, 1 Macq., H. L., 461, a director in a Railway Company was a partner in a firm of founders with which the Railway Company contracted for metal chairs.

The contract was made without the active participation of Blaikie on either side.

Suit to compel the Railway Company to receive and pay for the undelivered balance. One defense interposed rested on Blaikie's dual position.

Held that the fact that Blaikie was but one of several directors did not affect the principle involved.

On this subject Lord Cransworth, in deciding the case, remarks:

> "It was Mr. Blaikie's duty to give to his co-directors, and through them to the company, the full benefit of all the knowledge and skill which he could bring to bear on the subject. He *was bound* to assist them in getting the articles contracted for at the cheapest possible rate. As far as related to the advice he should give them he put his interest in conflict with his duty; and whether he were the sole director, or only one of many, can make no difference in principle.
>
> The same observation applies to the fact that he was not the sole person trading with the company. He was one of the firm of Blaikie Brothers, with

whom the contract was made, and so interested in driving as hard a bargain with the company as he could induce them to make."

In *Beeson v. Beeson*, 9 Barr., 279, a co-executor at an orphans' court sale, purchased, in the name of another, real estate belonging to the estate of his decedent.

The petition for sale was not of his procurement, and the court designated the real estate to be sold and he was in no way active in the proceeding, the entire matter being conducted by a co-executor.

The question was whether there was such actual fraud as would permit the sale to be set aside without repaying the purchase money, or only such constructive fraud as would require it to be repaid on rescission.

Discussing this subject, the court say (p. 282):

"By our system, he (the executor) is made a trustee of the realty regarded as assets, and, for certain purposes, becomes actively so, whenever it is necessary to subject freehold estates to a course of administration in payment of debts; * * * he is consequently charged with duties in respect of it. By force of the 20th Section of the Act of February, 1834, one of these duties is to apply to the proper orphans' court for an order to sell the real estate, whenever it satisfactorily appears to him that the personal estate of his decedent is insufficient to pay all the just debts; and consequent upon this is the obligation to take care that the land, when exposed to sale, shall bring the highest price reasonably procurable for it, or at least, *to preserve a position which will enable him to do so.* This brings him directly within the reason of a policy which, looking to *a possible clashing of interests* prohibits him to become an unconditional purchaser. The operation of the prohibition is not confined to those who are personally active in effecting a sale. It extends to all upon whom the act of a party or the law casts a fiduciary relation to the subject of the trust, *and which they are not permitted to shake off at pleasure*, to assume,

it may be, an attitude hostile to the persons beneficially interested; 3 *Sug. Vend.*, 6 Am. Ed., 158; *Ex Parte James*, 8 Ves., 352.

It embraces all who, being employed or concerned in the affairs of another, have thus enjoyed a means of information that might be employed in the destruction of the interests they are bound to promote, were the agent at liberty to convert himself into an owner against the consent of the principal. * * *"

Again (p. 287):

"'To effect these objects, equity does not inquire for fraud on the part of a trustee who attempts to purchase, but it removes temptation, by declaring him *incapable of making a purchase*, which will bind those for whom he is interested, and gives them the option to vacate or affirm the purchase.'"

In *Timme v. Kopmeier*, 156 N. W. (Wis.), 961, a director of a corporation contracted with one who was about to become manager of and to purchase 100 shares of stock in the corporation, to repurchase them at par and accummulated profits if the employment should be discontinued. This bargain was not known to all the stockholders.

In an action to compel such repurchase, relief was denied. The court say (p. 963):

"Under the facts of the instant case the defendant became interested to purchase plaintiff's stock whenever any of the contingencies specified in the contract happened. The defendant as director had a voice in determining whether or not plaintiff was to continue in the management of the corporate business, whether or not the plaintiff's management was for the general interest of the corporation and its stockholders. Obviously his duties as director and his private interest under the contract to repurchase * * * were antagonistic, and his private interest might oblige him to act contrary to his duties toward the other stockholders."

In *West v. Camden*, 135 U. S., 507, the facts were that the president, who was thought to control a large majority of the capital stock of the Baltimore United Oil Company owned by the Standard Oil Company, agreed to keep plain-

tiff permanently in place as vice-president of the Baltimore Company at a certain salary, in return for a sufficient consideration *moving direct to the company.*

Afterward plaintiff was removed and the salary cut off, whereupon he brought suit on the contract. *Held,* he could not recover.

The court say (p. 520):

> "The agreement alleged to have been made was one on the part of the defendant whereby he might be required to act contrary to the duty which, as an officer of the Baltimore * * * Company, he owed to that company and to the stockholders other than the plaintiff. * * *
>
> The principle involved is well settled in regard to public employment (citing authorities). The same doctrine has been applied to the directors of a private corporation, charged with duties of a fiduciary character to private parties, on the view that it is *public policy* to secure fidelity in the discharge of such duties. (Citing many cases.)
>
> We think this principle is equally applicable on the ground of public policy, although there was not to be *any direct private gain to the defendant;* for, as was said by the circuit court in this case, it was *the right* of the other stockholders in the Baltimore * * * Company 'to have the defendant's judgment, as an officer of the company, exercised with a sole regard to the interests of the company.' A personal liability for damages on the part of the defendant, in case the plaintiff should be removed after an agreement of the character alleged, was calculated to be a strong incentive to the defendant to act contrary to the true interests of the company and of its other stockholders."

In *Ex Parte Bennett,* 10 Ves. Jun., 381, the court make use of the following language (p. 397):

> "Upon the assignment the commissioners take from the assignees to themselves a covenant with all convenient speed to use their utmost endeavors to recover and get in the estate; and to dispose of it for

the most money, and to account; with a great variety of other covenants. The question would be very singular, to be agitated between the commissioner and assignee in these cases; to ascertain, whether there was a breach of this covenant; whether the assignee had sold for the best price, and with all convenient speed; the estate being sold to the commissioner. Does not the duty of the commissioner require him, at the instigation of the creditors, or even without it, to cast his view upon this most substantial question, whether the period is come, at which according to the acts of parliament the assignees ought to have collected the effects, and to make a dividend, and payment of surplus? *That is a duty, the due execution of which cannot be hoped, if the commissioners are to involve themselves in private pecuniary views and interests, with reference to the property.* If, for instance the commissioners, as is usual, take conveyances, the payment to be at a future day; are they to blame the assignees for not having sued the commissioners for the money, as purchasers? * * * It is therefore impossible to permit a commissioner to purchase.

If then a commissioner cannot purchase for his own benefit, upon the circumstances of this particular case, and admitting General Harris to be free from all blame, can the solicitor employ the commissioners to buy for a person unknown at the time of sale?"

For reasons then pointed out, the court holds that he cannot.

In *Guernsey v. Cook*, 120 Mass., 501, a shareholder in a corporation contracted with another that in consideration of that other's purchasing a part of his stock at a price named, he would secure to the purchaser the office of treasurer of the corporation with a fixed salary, and in case of removal, to purchase the stock at par.

Held, the contract was void as against public policy, and a fraud on the other members of the corporation. The court say (p. 501):

"The contract, if reasonably susceptible of two meanings, one legal and the other not, must indeed

receive an interpretation which will support rather than defeat it, and the presumption is in favor of its legality. But this contract necessarily implies that the defendant intended to derive, and the plaintiff intended to give him, a private advantage, not shared by the other stockholders, in consideration of his election as treasurer. And there is nothing in the facts disclosed at the time of trial that such was not in fact the result of the transaction, or that the agreement in question was known and consented to by the other members of the corporation.

It was the purpose and effect of the contract to influence the defendant, in the decision of a question affecting the private rights of others, by considerations foreign to those rights. The promisee was placed under direct inducement to disregard his duties to other members of the corporation, who *had a right* to demand *his disinterested action* in the selection of suitable officers. He was in a relation of trust and confidence, which required him to look only to the best interest of the whole, uninfluenced by private gain. The contract operated as a fraud upon his associates."

There is nothing in the report of the case to show that he (Cook) held any other position in the corporation than that of the controller of the majority of its stock.

In *Wilbur v. Stoepel*, 82 Mich., 344, the facts were as follows:

Two of the three stockholders of a corporation, who were also directors, agreed that in consideration of the purchase of some of their stock that vendee should be employed as business manager at a stipulated salary for two years, and then to repurchase his stock at a stated price if he wished to retire.

Held void as against public policy. In an action of assumpsit on the contract, the court say (p. 346):

"This alleged agreement between the defendants, who owned a majority of the stock, and the plaintiff, is contrary to public policy, and void as against those

> not consenting to it. The defendants were directors, and, in the management of corporate affairs, can not but be unduly influenced by such an agreement. Their natural desire and inclination would be to continue the plaintiff as manager, although it were against the interests of the other stockholders and would be against their own as stockholders, but for the agreement which might render them liable for the payment of a large sum if they failed to retain him. Nor is such contract made valid *by the good faith of the parties to it.* Its effect upon stockholders who are not parties to it, or do not consent to it, is the same in the one case as in the other. *The law, therefore, wisely condemns and prohibits all such contracts.*"

In *Comstock v. McDonald*, 136 Mich., 489, the administrator and widow of a deceased partner refused to consent to a sale of partnership real estate at a price agreed to by the surviving partners, but later entered into a secret agreement with the prospective purchaser whereby he was to pay the agreed price for the property, and an additional sum to the administrator and widow, in consideration of their assent, and the sale was accordingly consummated.

Held, that the sum paid the administrator and widow must be treated as an asset of the co-partners and accounted for by the administrator to the surviving partners. In the course of the decision, the court remarks (p. 495):

> "Counsel for the defendants say that a dissolution of a partnership by death makes the surviving partners trustees for the representatives of the deceased, but that there is not a similar reciprocal relation, and that the representative, having none of the authority of a co-partner, has none of the obligations of such. If it be admitted that the representative has no active share in the settling of the partnership business, we think that it does not follow that he has no duty toward his intestate's co-partners, but is at liberty to seek the furtherance of his own interests to the injury of theirs. If it is true that he may sell his interest in each individual piece of property owned by the firm (which we do not affirm), and captiously insist on a bonus

over and above his share of the proceeds of each piece of property that the surviving partners may seek to sell, enforcing the claim by a denial of their authority to sell and threats to prevent it by litigation, it is not difficult to see that serious embarrassment, if not loss, to the others would result."

APPELLANTS' DISCUSSION OF QUESTIONS 4-A, 4-B, AND 5-A, 5-B, AND 6-A, 6-B REVIEWED.

Appellants discuss these questions, as well as questions 5 and 6, together in the last few pages of their brief. Their argument centers upon these propositions, viz.: that equity will, when necessary to effectuate justice, look through the corporate entity to the stockholders, and give or refuse relief, according to the rights of the stockholders; that when it is inequitable to allow recovery to all the natural persons, the corporation itself will be denied relief.

(a) It is suggested that a director, though usually a fiduciary, sometimes is not, because he may be, under certain circumstances, a mere "dry" trustee.

This whole line of argument is based upon the assumption that throughout the transactions here involved the two groups of stockholders acted as principals, and that each group negotiated for its interests independently of the other.

We have already pointed out that as regards the Arctic Company this assumption is unfounded in fact. The theory underlying the argument of appellants, earlier made in their brief, is inconsistent with this assumption.

It has been strenuously urged that Mather was negotiating with the Oliver solely with reference to his so-called "rights," and that he left his interest in the Arctic, as well as the interests of the other group of stockholders, wholly to the care of directors Breitung and Kaufman.

The finding is distinct that Mather, having procured the secret bargain he sought, was willing to commit, and did commit, the negotiations of the terms of the lease in behalf of the Arctic to the other directors (Finding 10). It cannot be claimed that he was negotiating with the Oliver for a lease as to his stock interest in the Arctic and leaving Breitung and Kaufman to negotiate a lease as to their interest in that stock. Such claim would be manifestly absurd, and, further, would be wholly inconsistent with the facts found. Mather, it is true, negotiated, without the knowledge of Kaufman and Breitung, for the secret interest in the lease, by reason of the promise of which he accepted payment of his debt and surrendered his pledge of the Queen leases. He left to Kaufman and Breitung the matter of negotiations as to all the terms of the Oliver lease itself—negotiations for the *whole interest of the Arctic Company*, so far as Kaufman and Breitung knew, or were allowed to know.

It is plain that those gentlemen did not act as principals with reference to their stock interests in the Arctic, but for all the stock. Mather did not act as principal for his stock interest. He committed to his fellow directors the negotiations of terms, which would affect his interest as a stockholder just as much as it would affect theirs. The stockholders did not act independently, each as to his own stock interest and as a principal in the negotiations. The directors and officers did not simply legalize, as appellants claim, the agreements entered into by stockholders as principals.

The Arctic Company was not a fiction. Its stockholders were not tenants in common of the ore body which it owned. By his secret bargain, Mather got for the Cliffs an interest in the lease of that ore body. He was no "dry" trustee, but a fiduciary who disregarded his duty.

This case is not within the line of cases cited by counsel for appellants, in which equity to promote justice will look through the corporate fiction.

In negotiating and executing the Oliver lease, the different groups of stockholders did not act each for himself; nor is it true that the action taken was not corporate action. It

would be idle to discuss at length the many cases cited in this connection in the brief of appellants. No one of them is such a case as this. However well decided under the facts involved, those cases throw no light on this. To illustrate by reference to one or two of them:

In *Old Dominion Copper Company v. Lewissohn*, 210 U. S., 206, it was held that as Bigelow and Lewissohn owned all the capital stock, the corporation could not complain of a sale which they made.

If all the stockholders of the Arctic had known of and agreed to the secret bargain made by Mather, and consented that he and Hayden might continue to administer both sides of the lease the Arctic Company, upon the authority of the above case, could not complain of the bargain.

In *Beardsley v. Beardsley*, 138 U. S., 262, two brothers had agreed that one should purchase one-third of the joint enterprise and become a one-third owner of it. Such being the real agreement, this court held that the sale of certain stock was not a mere stock sale, but something more, and that the real agreement might be enforced. There are no facts here to which the doctrine of that case is applicable. Mather and Breitung and Kaufman made no such agreement. In fact, they never made any agreement. They were merely fellow stockholders in the Arctic, who were not on good terms. Their respective relations to the transaction have been fully stated.

On page 61 of the brief of appellants, there is a quotation from *Mechem on Agency* to the effect that the relation of agency must exist between the agent and the person who claims protection as principal, and the agency must be one which involves a duty having some reference to the matter of the claim made.

There is no doubt that the learned author states the rule correctly. This case is plainly within the rule under and in view of the authorities we have heretofore set up. Director Mather was an agent of the Arctic. The Arctic, as principal, claims protection. The director was under a duty

not to make, for his independent principal, a secret profit out of the property of the Arctic, which was the subject matter of the proposed lease to the Oliver, nor to administer both sides of that lease when made.

On page 62, counsel asks if an ordinary agent is relieved of disability when the principal himself retains control and management, why their corporate director is not likewise relieved when the stockholder in fact managed the corporation.

The answer is clear. The stockholders did not in fact manage the corporation. They elected to vote by unanimous vote and the directors managed it.

(b) In connection with the question, attention is called by counsel to the language of the Michigan Mining Act, which forbids the alienation of mining property without the vote of three-fifths of the stock. It is also urged that a lease of mining property is an alienation thereof.

We may readily admit that such lease is an alienation. The statutory provision, however, is not ground for the argument that stockholders of this company in fact managed and controlled it in such sense as to relieve its directors of their duties as fiduciaries. It is not even claimed that Arctic's lessor interests under the lease were managed otherwise than by the directors.

The court of appeals for the sixth circuit has passed on the effect of the Michigan Act above alluded to. It held that the statute is a limitation merely upon what would otherwise be the power of the directors and not a grant of new power otherwise non-existent in the corporation.

Baggaley v. Pittsburgh Mining Co., 90 Fed., 636.

The learned district judge who first heard the case at bar, said:

> "The fiduciary relation is not to my mind altered by the fact that the stockholders had primary authority over the granting of the lease. Action of the offi-

cers and directors was none the less required. It was in fact had."

The statute does not provide that after a proper vote of the stockholders no action by the officers or directors shall be taken, but that no such action shall be taken by directors or officers unless three-fifths of the stockholders have voted in favor of it. The statutory provision applicable to all mining companies, however numerous their stockholders, does not help the claim of the appellants that in fact in this case the stockholders each negotiated, in respect to his interest, independently of the others.

(c) As to the summing up of this branch of counsel's argument on pages 63 and 64 of the brief, it is necessary to say only this:

There is nothing here to suggest that the corporate form of the Arctic was adopted for fraudulent or illegal purposes. There is nothing here to show that the stockholders expressly agreed to look after their respective interests in the corporation, and nothing from which the existence of any such agreement can be implied. On the contrary Kaufman and Breitung, by the express assent of Mather, after he had got what he wanted from the Oliver, were authorized to look after the interests of *all the stockholders of the Arctic* in the negotiations of a lease.

VI.

Mather's withdrawal from participation in negotiation of lease, after procuring the secret agreement, did not satisfy his director's duty.

Question 5-a.

When it appeared that the Cliffs had interests and desires pertaining to the new lease which might conflict with the course Kaufman and Breitung desired the Arctic to take, did the Cliffs and Mather perform every duty which by law rested upon him as director of the Arctic and through him upon the Cliffs when Mather withdrew from any further participation in the matter and notified Kaufman and Breitung that they could go ahead and make for the Arctic a contract satisfactory to them, and that the Cliffs and Mather would acquiesce therein? or

Question 5-b.

Was it the duty of Mather, as director in the Arctic, either to disclose to Kaufman and Breitung what he had done and the knowledge he had acquired as an officer of the Cliffs and on behalf of the Cliffs, or else to resign as a director in the Arctic?

The substance of these questions is so nearly like that involved in the question last above discussed, that most of what we have just said seems to us applicable here. Indeed the appellants treat both branches of Questions 4 and 5 together.

If a director makes a bargain whereby he is to derive secretly a profit from transactions of his corporation, is it possible that he may escape accounting for those profits simply by absenting himself from the meeting of the board of directors at which the transaction is considered and acted upon; or, on the other hand, is it the duty of a director fully to disclose to his fellow members the situation, so that at that meeting they may act with a full knowledge of the

facts and of the advantages or disadvantages to the stockholders of carrying through the plan?

In the light of the authorities heretofore discussed, the answer to these questions is obvious.

If a director has secret and private interests in the matter under consideration, and is unwilling to disclose them, it is his duty to resign.

A director whose personal interests are adverse to those of the corporation has no right to be, or act as, a director. As soon as he finds that he has personal interests which are in conflict with those of the company, he ought to resign, no matter if a majority of the stockholders, as well as himself, have such personal interest. He does not represent them as persons or their personal interests. He represents them as stockholders and their interests as such. He is trustee for the company.

> *Goodwin v. Cincinnati, etc. Canal Co.*, 18 Oh. St., 169.

The equal holding of stock in the Arctic and the equal division of the directors amongst the stockholding interests does not render the well-settled general principles applicable to directors inapplicable to this case.

There is a further consideration, viz.: that Mather was guilty of a continuous breach of duty.

Not only did he conceal the lessee interest of the Cliffs in the Oliver lease at the time it was executed, he also continued as director and secretary of the Arctic and president and treasurer of the Cliffs, while the secret interest for years remained undiscovered. He was on both sides of the bargain, not only as to the making of the lease, but continuously as to the enforcement of its terms afterward. He and Hayden enjoyed the unique position, from 1899 to 1904, of administering the lease openly as directors of the Arctic and secretly as representing the Cliffs' interest in the lease, to see that the Cliffs took no harm in case of violation of the lease.

They were in a position, on failure, promptly to pay royalty or the minimum or on application by lessee for a reduction thereof, to use their influence as *disinterested directors* of the Arctic to dissuade their duped fellow directors from pressing the Arctic's claim as lessor, and if in that they failed, they then could easily find a plausible pretext to vote as Arctic directors against *any Arctic action* calculated to menace the Cliffs' lessee interest, *or reduce its profits;* which would, of course, to the extent that they were stockholders in the Cliffs, benefit Mather and his relatives. The liability of such a situation presenting is well illustrated by the finding of fact No. 6, page 3, respecting the performance of this very land under the prior leases:

> "Some of the time prior to 1897, mining under the Queen leases had been profitable; in 1897 and 1898 market prices were low, the Queen could not pay the agreed royalty or meet the minimum without loss, and the lessors had from time to time accepted less than the agreed rate rather than forfeit the leases."

It is no answer to say that no fact is found in the certificate showing that they did so. They had the power to do so, whether they used it or not. The occasion for its exercise might present at any time. Their power continued the same after discovery, except that they lost the advantage of apparent disinterested advice and persuasion over their unsuspecting fellow directors, which they had formerly possessed while posing as trustees of the Arctic without adversary interests.

Here was a lease lawful in form and such in substance as the Arctic had made for itself. No fact found in the certificate tends, even in the remotest degree, to establish an understanding on behalf of the Arctic or of its stockholders, that it and their interests were to be watched over and guarded and the provisions of this lease enforced in its favor otherwise *than by the directors of the Arctic. In this respect neither their powers nor responsibilities, by agreement or otherwise, were to be curtailed.*

To make a lease is an act complete in itself. To guard, protect and enforce efficiently and watchfully the lessors' interest under it is quite another, separate and *equally important act*. It well may be that by working a mine in an unworkmanlike manner; by taking such ore only as presents the least difficulty and the lowest cost; by improperly grading ore, and by failure to promptly pay royalties at the rate called for in the lease on that grade, and in numerous other ways, the lessee can lower his costs and increase his profits. Questions respecting these and numerous other matters might, and probably would, arise from time to time. As respects all of them when and as they should arise, this Arctic board must deal, and were, *by the inherent obligation of their office, bound to deal;* and they were individually and as a board charged with the duty of deciding all such questions, with an eye single to the advantage of the Arctic Iron Company.

It is not even claimed that there was an understanding that Mather and Hayden might occupy a double position and represent adverse interests under this lease—one as director of the Arctic, guarding its lessor interest, the other as president and treasurer and attorney, respectively, of the Cliffs, representing its lessee interest—directly antagonistic to the lessor, Arctic. No understanding existed at the time of this transaction or later that Mather and Hayden should purposefully hide their antagonistic interest from the Arctic lessor, while they guarded, protected and enforced efficiently and watchfully the Cliffs' lessee interest under the lease, as well as those of the Arctic, lessor. There was no understanding that they might falsely pose as disinterested before their duped associates on the Arctic board, while the Cliffs pursued the even tenor of its lessee way, operating as might be most profitable.

There was no agreement that, should their fellow directors attempt to correct abuses in operation under the lease, that they might be privileged to deny, explain or palliate the derelictions of the lessee under discussion, and thus posing, perhaps dissuade their duped fellow directors by such argument as one honest man may make to another when their interests are the same and they serve but one and the

same master. If the same argument came from the known lessee, or its representatives, it might serve but to strengthen the determination of the lessor to insist upon the strict observance of the lease's covenants, made for his protection; whereas, coming from their associates, supposed to have no antagonistic interests, it would be given great weight.

This position of Mather and Hayden, so occupied through all these years with the approval and consent of the Cliffs, is a separate, distinct and continuing wrong against the Arctic and its stockholders other than the Cliffs.

It is a wrong wholly independent of the original transaction; relates to an entirely different act, and all the profits here sought to be recovered accrued to appellants while Mather and Hayden continued for years secretly and afterward openly, to serve two masters, and were in position to administer both sides of the lease.

What in fact was or was not done by them while occupying this dual position is immaterial. It is sufficient that they had *the power to do the evil,* whether they used it or not, and without regard to how for it profited their independent principal. While they were thus circumstanced, the Cliffs accumulated net, to 1913, some $900,000 of profits.

During all those years, its officers and agents, Mather and Hayden, as Arctic directors, were handling, *not the Cliffs' property alone,* as represented by one-half the Arctic stock, *but all of the Arctic's property in the lease, including the other half belonging to Breitung and Kaufman as represented by their one-half of the Arctic stock.*

First, it elected them to the Arctic directorate; then, by collusive secret dealing, it placed them in a position, which they could not have occupied except for such collusive secret dealing, to dominate the Arctic board for a long term of years while it enjoyed its lessee position under the protection they could afford it in the position in which

it had put them. While thus placed by their collusive acts, it accumulated $900,000 of profits to 1913.

Every principle of equity and fair dealing requires that this profit be now disgorged in favor of the Arctic Iron Company.

Equity will not strike through corporate forms to assist these appellants to retain the fruits of their double dealing under such circumstances, but will, from considerations of justice, as well as public policy, require them to disgorge it.

The conflict between duty to the corporation and self-interest is even more obvious than would have been the case had the inducement moving Mather to agree to the Oliver lease been payment once for all of some amount of money.

The answer to Question 5-a should be "No," and the answer to Question 5-b should be "Yes."

VII.

Equitable relief not barred by any consideration of relative beneficial interests. The Cliffs exchanged its right to participate in royalty collected under the Queen leases for one-fourth of the ore mined under the Oliver lease.

Question 6-a.

If it was the legal duty of Mather to disclose to the Breitung directors the fact that the Cliffs was to be interested in the lease, is the further fact, that, as the net result of the transaction, Kaufman and Breitung leased their beneficial three-fourths in the ore upon their own terms and the Cliffs retained its one-fourth interest in the ore, sufficient to bar a court of equity from enforcing any trust which might otherwise arise in favor of the Arctic in and to such one-fourth interest? Or,

Question 6-b.

Did such trust, as matter of law, become so fixed that a court of equity will proceed according to the legal rights of the Arctic without regard in this particular, to the relative beneficial interests of the stockholders?

Appellants' counsel treat the subject matter of these questions as involved in Questions 4 and 5, and put forward no separate argument respecting them. It may be unnecessary for us, therefore, to add to what we have already said as to Questions 4 and 5.

We desire, however, to submit some considerations having particular bearing upon these questions as put.

The Cliffs did not have a one-quarter interest in the ore until after the signing of the Oliver lease. As put, the question seems to indicate that it had such interest.

The Cliffs, by virtue of its ownership of one-half of the stock of the Arctic, did not own one-quarter of the ore in the land of the Arctic.

At the time of the negotiations the Queen leases were in force. The shortest had seven years to run, the longest ten years. The Arctic Company owned the fee. The Queen Company had the right, under its leases, to take out the ore. All that the Cliffs Company had by virtue of its stockholding was a right to one-half of the royalty payable to the Arctic by the Queen upon the removal of the ore. The Cliffs desired to own the ore; sought diligently, through Mather, for a lease which would enable it to become the owner of the ore; and failing to get the lease, agreed with the Oliver for one-quarter of the ore at cost, if, under its reserved right in any year, it did not wish to take less. The net result of the transaction was that it exchanged its right to receive money by way of dividends, after payment of royalties by the Queen, for ore, to come to it under the lease by virtue of the secret agreement.

It is plain from the findings that the lease to the Oliver would never have been made if Mather had not received its promise for ore. It is also plain that had the promise been known to the other directors of the Arctic, the Oliver lease would never have been made. The secret bargain by Mather with reference to the property of the Arctic for the benefit of the Cliffs is what produced the execution of the lease and this litigation.

If we have been right in our contentions as to the duty of a director, and the recovery of profits upon discovery of his dereliction, a court of equity will, we submit, proceed, according to the rights of the Arctic, to compel repayment to it of the profits derived through Mather for the Cliffs, his independent principal, as the result of his breach of duty.

As is pointed out by many of the cases cited by us in this brief, it is no answer to a bill for an accounting that the arrangement has turned out to be beneficial, or not harmful, to the corporation. What the court below speaks

of as the relative beneficial interests of the stockholders in the ore ought, under the circumstances of this case, not to interfere with the enforcing of the trust in favor of the Arctic Company.

We submit that Question 6-a should be answered "No," and Question 6-b "Yes."

VIII.

Certain claims of appellants reviewed. Conclusion.

Appellants, in the last two pages of their brief, submit a number of propositions. Most of them we have discussed. We feel obliged, however, to say that some of these statements are not borne out by the record. We submit that it is not true that in fact each stockholder looked after his interests in the Arctic, and that it is not true that there was no breach of duty and no fraud in this whole matter. Nor is it true that each side knew of the other's interests and knew that the other was taking care of his interests. Nor is it true that recovery is sought solely for Kaufman and Breitung's benefit. Recovery is sought for the benefit of the Arctic Company. If it is had, the stockholders can share in it only in accordance with their stock interests.

It is not true that no advantage was taken by anyone of the directors' relation, and that no concealment, amounting under the circumstances to fraud, was practiced by one side upon the other. Nor is it true that the stockholders acted as principals in this transaction; nor, as a matter of law, for reasons above set forth, that the directors represented nobody but the particular principal that selected them and put them on the board.

Colgate v. Leather Co., 73 N. J. Eq., is alluded to as negativing the duty of Mather to resign as director if the secret arrangement was to be carried through. An examination of the case shows that it has nothing to do with the duties of directors or their resignations, but only with

the question whether, under the law of New Jersey, stockholders can be deemed to be trustees for each other.

The suggestion that Mather's conduct was the equivalent of a resignation, considering his concealment of the matter which was of vital consequence in the final consummation of a lease, and his continuing to administer both sides thereof seems hardly worthy of consideration.

The remarks on the last page of the brief are but a repetition of the claim necessarily made by appellants, and unfounded in fact—a claim made in various forms almost from the beginning to the end of the brief—that there was an agreement among the stockholders each to look after his own interests, and proceed as if they were co-tenants of the land. The findings do not bear out the claim of the appellants in this regard, and we submit that upon the vital matters, therefore, here involved, appellants' position cannot be sustained.

We submit that there is nothing disclosed in the certificate to take the case out of the general rule that directors are fiduciaries and that every consideration of public policy and common honesty precludes appellants from profiting on both sides of this lease.

Respectfully submitted,

S. W. Shaull,
A. C. Angell,
Solicitors for
Arctic Iron Company.

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In the Supreme Court of the United States

October Term 1917. No. [redacted]75

CLEVELAND CLIFFS IRON COMPANY and WILLIAM G. MATHER,

Appellants,

v.

THE ARCTIC IRON COMPANY,

Appellee.

Supplemental Brief of Appellee

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IN THE

Supreme Court of the United States

CLEVELAND CLIFFS IRON COMPANY and WILLIAM G. MATHER,
Appellants,

v.

THE ARCTIC IRON COMPANY,
Appellee.

October Term, 1917. No. 324.

SUPPLEMENTAL BRIEF OF APPELLEE.

This is an equitable action instituted in the Circuit Court of the County of Marquette, State of Michigan, by The Arctic Iron Co. The bill of complaint, filed June 13, 1904, prays for a decree declaring Appellants Trustees for the use and benefit of Appellee; for an accounting; for injunction; and for general relief.

On July 5, 1904, the action was, on petition of Appellants, removed to the United States Circuit Court for the Western District of Michigan, Northern Division.

On trial of the action in the said United States Circuit Court, the Court decreed that the defendants, appellants herein, should account to the Arctic Iron Co. for profits derived by the defendant Cleveland Cliffs Iron Co. from

NOTE.—Italics in quotations from opinions herein are ours.

a secret bargain made with Oliver Iron Co. on or about February 14, 1899, by and through defendant Mather, then a director and Secretary of the Arctic Iron Co., and President of the Cleveland Cliffs Iron Co., and upon said accounting (which covered the period until 1913) it was found that the Cleveland Cliffs Iron Co. had derived as profits from said secret bargain (after deducting $112,500 paid for its share in the capital stock of the Regent Mining Co., and $32,875, one-fourth of the amount paid for the one-fourth interest in the one parcel of land embraced in the Oliver lease purchased from Kaufman and Breitung), the sum of $889,403.74, including interest as computed by the Master, and decreed the payment of said sum to Arctic Iron Co., with interest thereon at the rate of five per cent per annum from April 25, 1913, until paid.

From the judgment of the United States District Court defendants appealed to the United States Circuit Court of Appeals, Sixth District.

The Circuit Court of Appeals certified to this Court, under the provisions of Supreme Court Rule 37, Section 239 of the Judicial Code of the United States, certain questions of law based on findings of fact in said certificate set forth.

Appellants moved this Court to advance the hearing of this case, and Appellee moved for a certiorari certifying the entire record herein. On March 6th, 1917, the motion to advance and the motion for certiorari were denied.

Statement of Case.

The brief filed herein on behalf of Cleveland Cliffs Iron Co. and William G. Mather discloses the fact that the basis of appellants' contention that the questions of law propounded by the Circuit Court of Appeals should be answered in such a way as to relieve them of the force of the law applicable to fiduciary relationships, is founded on the following proposition:

That while the Arctic Iron Co. was a corporation in form, it was in fact a mere business convenience created by the parties interested in the property to hold the title thereto; that the stockholders acted as principals and each negotiated with respect to his interest independently of the others; that the directors and stockholders were used simply for the purpose of legalizing in corporate form the agreements entered into by the stockholders as principals.

A consideration of the whole brief shows that if appellants fail in maintaining this position, their entire defense to the action is swept away.

The other positions taken in the brief based upon and dependent on sustaining the foregoing propositions, are:

1. That while Mather and Hayden were in form directors of Arctic, they were not such in fact, and that, therefore, neither of them nor their principal, the Cliffs, sustained any fiduciary relationship to the Arctic or the other directors and stockholders.

2. That the Arctic and Kaufman and Breitung are estopped from bringing this action, and that Kaufman and Breitung have not come into equity with clean hands.

3. That rescission is the only remedy.

In said brief, on pages 1 to 9, inclusive, there appears what purport to be the facts upon which are based the questions of law propounded. Said statement is so incomplete and the alleged facts are so mixed with argument and opinion of counsel, that the same is necessarily misleading.

The Facts as Shown by the Record.

For the purpose of making clear the facts involved herein, the same may be stated as follows:

The ARCTIC IRON Co. (hereinafter referred to as ARCTIC) was organized with a capital stock of 20,000 shares, and its articles of association provide that four shall constitute its Board of Directors.

The CLEVELAND CLIFFS IRON Co. (hereinafter referred to as CLIFFS) is a corporation authorized to acquire and hold stock in other corporations.

On or about November 26, 1898, Cliffs purchased and became owner of 10,000 shares (half of the stock) of Arctic, and caused the same to be issued:

To William G. Mather, Trustee	9,998 shares
To William G. Mather	1 share
To George Hayden	1 share

Mary Kaufman and Edward N. Breitung, William G. Mather and George Hayden were elected directors, and

Mary Kaufman, President, and William G. Mather, Secretary and Treasurer of Arctic.

Kaufman and Breitung individully owned certain mineral rights and Arctic owned other mineral rights embraced in certain leases which were, at the time Cliffs purchased its stock in Arctic, held by Corrigan, McKinney & Co. (hereinafter referred to as Corrigan), the properties embraced in said leases operated as one enterprise.

Cliffs was at that time interested in Corrigan, being their creditor in the sum of $250,000, and Corrigan having a contract of transportation over a certain railroad in which Cliffs was interested.

The terms of royalty and minimum under Corrigan leases were larger than under the lease afterwards made.

Prior to 1897, under the Corrigan leases, the lessees made money, but during 1897 and 1898, there were times when the lessees could not pay the agreed royalty without loss, but a revival of business was anticipated for 1899.

Corrigan was largely indebted and desired to sell their interests in said leases, or to negotiate a new lease, and Kaufman and Breitung were so advised.

Cliffs, for some time prior to December, 1898, negotiated for a lease, and about December, 1898, notified Kaufman and Breitung that it desired a lease for the property embraced in the Corrigan leases, and asked for a lease at eleven cents royalty and a minimum of 100,000 tons.

At about the same time the Oliver Mining Company (hereinafter referred to as Oliver) proposed to take a lease from Arctic on the property covered by the Corrigan leases at a higher royalty and larger minimum than that offered by Cliffs, but at a smaller royalty than that stipulated in the Corrigan leases.

The offers from Cliffs and Oliver each contemplated a joint lease from Arctic and from Kaufman and Breitung, covering the property embraced in the Corrigan leases.

In January, 1899, Kaufman and Breitung, acting for themselves and as directors of Arctic, expressed a willingness to make the lease to Oliver on the basis of the royalty proposed, on condition that the minimum and other terms could be thereafter agreed upon.

After Kaufman and Breitung had agreed to accept the Oliver lease, which was the best offer made, Cliffs offered, through Mather, to take the lease on the same terms and to pay a bonus. Kaufman and Breitung declined to accept the proposition of Cliffs either for themselves personally or as directors of Arctic. They knew, however, that the Oliver lease could not be made without the consent and approval of Cliffs for the reason that Cliffs owned half of the stock of Arctic and two of the four directors (Mather and Hayden), were controlled by it in dealing with the property of Arctic. *Cliffs thus had it in its power to, and did, absolutely block the proposed lease to Oliver.*

Cliffs, through Mather (at that time President and Treasurer of Cliffs, and Director and Secretary of Arctic), surreptitiously and without the knowledge or consent of either Kaufman or Breitung, took up negotiations with Oliver *to secure to itself pecuniary benefits as compensation for it to withdraw its objection to the Oliver lease.*

As a result of these secret and clandestine negotiations, *Cliffs agreed with Oliver to withdraw objection to the proposed Oliver lease in return for which it was to receive one-quarter of the profits to be made from said lease.*

In consummation of said deal and agreement, the one-half of the stock of Arctic owned by Cliffs in the name of Mather and Hayden was voted in approval of said lease, and Hayden voted with his fellow directors, Kaufman and Breitung, to approve the same, and Mather, as Secretary, certified said lease.

The fact that Cliffs was to receive one-fourth of the profits of the lease was carefully concealed from Kaufman and Breitung, and Oliver was requested by Mather, representing Cliffs, not to disclose that fact, and both Oliver and Cliffs *took pains to put the deal in such shape that the papers likely to be seen by Kaufman and Breitung should not reveal the fact.* By these means it came about that Kaufman and Breitung did not learn until about five years afterwards that Cliffs was interested in the Oliver lease.

In 1904 Kaufman, President and Director, and Breitung, Director, first learned that Cliffs had an interest in this lease, and without delay this action was instituted by Arctic.

The facts certified on which the Circuit Court of Appeals bases questions of law on which instructions are asked.

The facts found and certified by the Court are few and simple and may be reduced to small scope:

(1) That the Arctic Iron Co. is a corporation;

(2) That its stock, since November 30, 1898, has been, and is, owned, one-half by Kaufman and Breitung, and one-half by the Cleveland Cliffs Iron Co.

(3) That since November 30, 1898, the Board of

Directors and officers of said company has been composed of four, Kaufman, President and Director, and Breitung, Director (who have acted together), and Mather, Secretary and Director, and Hayden, Director (who were at the same time President and attorney, respectively, of the Cleveland Cliffs Iron Co., and who acted together as trustees and representatives of the Cleveland Cliffs Iron Co.).

(4) That an equal balance of the Board of Directors of Arctic was maintained by agreement and for the purpose of making it impossible for Kaufman and Breitung, on the one hand, or Cliffs, through Mather and Hayden, on the other, to commit Arctic to any contract, agreement or line of action, without the approval and consent of at least one of the other directors.

(5) That in 1898 Corrigan held leases from the Arctic and Kaufman and Breitung for mineral rights, of which Arctic owned one-half, and Kaufman and Breitung owned the other half.

(6) That by the terms of said leases, the lessors were to receive a much larger royalty than they were to receive under leases afterwards made with Oliver.

(7) That Corrigan received from Oliver and Cliffs, as compensation for relinquishing their leases, $100,000 in ore and relief from payment of the debt of $250,000 they owed Cliffs.

(8) That Cliffs secured the payment of its debt of $250,000 and the benefit of the contract of transportation with a railroad in which it was interested.

(9) That in December, 1898, Cliffs, through Mather, its President, and at that time a director and Secretary

of Arctic, endeavored to secure from Arctic and Kaufman and Breitung the property covered by the Corrigan leases at eleven (11c.) cents per ton royalty, with a minimum of 100,000 tons. Kaufman and Breitung refused, personally, and as directors of Arctic, to make said lease.

(10) That about December, 1898, Oliver proposed to Arctic and Kaufman and Breitung, to lease the property embraced in the Corrigan leases, at royalties of about fifteen (15c.) cents per ton, with a larger minimum.

(11) That Cliffs, through Mather, objected to the Oliver lease, and asked for a lease to Cliffs on the same terms, with a bonus in an amount undisclosed.

(12) That Cliffs had the power to, and did, absolutely block the proposed lease to Oliver, and this deadlock continued until Cliffs agreed to the Oliver lease.

(13) That an agreement was made between Cliffs and Oliver that Cliffs would withdraw objection to the Oliver lease on condition that Cliffs should receive a one-fourth interest in the said lease.

(14) That this agreement was *secret*, and Oliver and Cliffs, acting through Mather (who was at that time Director and Secretary of Arctic) took steps to, and did, conceal the fact of said agreement from Kaufman and Breitung.

(15) That if the *secret agreement* between Cliffs and Oliver had been disclosed to Kaufman and Breitung, *the lease to Oliver would not have been made.*

(16) That the lease was made by Arctic and by Kaufman and Breitung to Oliver; Arctic agreed to the lease by a vote of the stockholders, the stock of Cliffs being

voted in the affirmative, and the lease was approved by unanimous vote of the three directors present: Kaufman, Breitung and Hayden, and was signed by Kaufman, President, and attested by Mather, Secretary.

(17) That the property belonging to Kaufman and Breitung personally, embraced in the Oliver lease, is the same as that embraced in the Corrigan leases.

(18) That the price asked by Kaufman and Breitung for the undivided one-fourth fee interest in the ore parcel owned by them personally was known by Oliver, Cliffs and Mather before lease to the Oliver was made, and there was no concealment or deception on the part of Kaufman or Breitung.

Questions of law on which the Circuit Court of Appeals asks instructions.

The certificate of the Circuit Court of Appeals contains the findings of fact upon which the questions of law arise.

The questions of law submitted appear in full in the record herein, but the same, stripped of verbiage, may be stated as follows:

(1) Does the fact that Cliffs owned one-half of the Arctic stock, and that the President and attorney of Cliffs, as Trustees and representatives of that stock, composed one-half of the Board of Directors, fix Cliffs with such fiduciary relationship as to permit Arctic to recover from Cliffs' profits made under the Oliver lease?

(2) Did Mather, as Director of Arctic, representing Cliffs' interest, owe any duty to the other directors to

disclose the fact that Cliffs was to have an interest in Oliver lease; or

(3) Did he perform every duty he owed Arctic as a director when he notified the other directors that he and his principal, Cliffs, would acquiesce in the Oliver lease; or

(4) Resign as a director of the Arctic?

(5) Is Arctic's remedy confined to rescission of the Oliver contract?

(6) Does the fact that Kaufman and Breitung insisted on selling in connection with the Oliver lease, at more than the market value, certain property embraced in the Corrigan leases, owned by them personally, bar Arctic from bringing this action?

ARGUMENT.

I.

Did Mather, while acting as a director of Arctic, sustain a fiduciary relationship to the corporation?

Appellant's brief (page 14) says:

> "It will probably be argued that Mather's absence from the directors' meeting and his attestation as Secretary of the lease, were effective in consummating the approval of the lease, and, therefore, were within the contemplation of the Oliver and Cliffs when they made their contract. If this be granted it will not change the legal situation. The arrangements with Oliver did not contemplate any wrongful act on Mather's part. At

> most, it allowed Kaufman and Breitung to lease their three-fourths interest on their own terms. Mere failure to act is negative and not wrong, unless there exists affirmative duty to act."

The facts certified and the statements contained in the questions of law by the Court make it clear:

That Mather was a director of Arctic; that he acted for and represented Cliffs as such director; that his principal, Cliffs, through him, held up and prevented the Oliver lease until they secured pecuniary benefits for Cliffs in which Arctic did not participate; that he and his principal carefully and intentionally concealed from the other directors the fact that Cliffs had an interest in the Oliver lease; that if the interest of Cliffs in the Oliver lease had not been concealed, the Oliver lease would not have been made a nd the Corrigan lease would have remained in force; that the Corrigan lease would have paid Arctic much more than the Oliver lease paid both Arctic and Cliffs.

It is admitted that Mather was a director and Secretary of Arctic, and as Secretary certified the Oliver contract.

He was named by his principal, Cliffs, and accepted the position of director and the office of Secretary, and as such director and officer was, in good faith and common honesty, bound to give to that corporation perfect fidelity and whole-hearted service.

In dealing with the property of the corporation the law does not permit a director to know any other person or corporation.

When one accepts a place of trust he assumes the obligations attaching to the position he accepts. The director of a corporation occupies a fiduciary relation-

ship to the corporation. His fellow-directors and stockholders have the right to demand of him that he shall protect the interests of the corporation, and in good faith give to the welfare of the corporation that he directs such information and judgment as he has, uninfluenced by ulterior motives or the conflicting interest of himself or others.

A director must not only abstain from doing the corporation injury, but he must give to it his active co-operation and assistance in protecting its rights and furthering its interests.

The withholding from his fellow-directors of information that vitally affects the corporation, is a violation of the good faith that the relationship imposes.

The securing of profit for himself or his principal by secretly making a contract for the benefit of his principal, with the corporation of which he is a director, is a violation of the rules of equity and good conscience.

If one who is made a director of a corporation and entrusted with its management by its stockholders and thereby commissioned to protect their interests, sustains no fiduciary relationship to the corporation and its stockholders, then the courts have, with wonderful unanimity, misconstrued the law.

The basis of our civilization is the faith and confidence that men have in each other.

> "No man can serve two masters; for either he will hate the one, and love the other; or else he will hold to the one, and despise the other."—Matthew VI, 24.

There are those who look on treaties as "mere scraps of paper" to be disregarded and repudiated by the party to the treaty having the most force and being the best

prepared to destroy those who object to the abrogation of solemn obligations.

There are those who look on a promise as an easy expedient to escape present embarrassment.

The law of this country, as enunciated by the courts, has impressed on our people a different conception of the sacredness of a trust, and it holds to strict accountability those who assume obligations.

It has been uniformly held by the Courts that when one accepts a position of trust he assumes the obligations attaching thereto.

> "A trustee must not avail himself of his fiduciary character for any object of personal benefit. His fundamental duty is to do his utmost for the *cestui que* trust, and every advantage which he appropriates to himself must be acquired by dereliction from that duty." Adams Equity, page 59.

The Courts agree with the poet who said:

> "Mankind is unco weak,
> And little to be trusted;
> When self the wav'ring balance shake,
> 'Tis rarely right adjusted."

The facts certified by the Court herein show that there was a deliberate and dishonest purpose on the part of Cliffs and its agent Mather in dealing with the property of Arctic. Mather endeavored to secure a contract for Cliffs at a figure less advantageous to Arctic than the existing contract with Corrigan; he opposed a contract with Oliver and prevented the making of said contract until he negotiated a secret deal with Oliver by which Cliffs secured one-fourth of the benefits of the contract.

The fact that Cliffs had an interest in this contract was concealed by means of the organization of the Regent Mining Company, and Kaufman and Breitung, Mather's co-directors in Arctic, were purposely kept in ignorance of this fact until they discovered the truth from other sources in spite of the effort of Mather and Cliffs to keep them in ignorance. At this time Mather was President and a stockholder in Cliffs, and personally participated in the secret advantage enjoyed by Cliffs (certainly to the extent of his stockholdings in Cliffs). These undisputed facts clearly establish fraud.

Under the decisions of the Court it is immaterial whether the fraud was constructive or actual. Fraud existed if Mather occupied the dual position of making the contract on the part of Arctic and of receiving a part of the benefits of the contract as a stockholder in Cliffs, or if Cliffs received the benefits of the contract. He was acting in a fiduciary capacity as representative of Arctic, of which he was a director.

If there was no fraud in the making of this contract, or if Mather, by withdrawing from the meeting of the Board of Directors at the time the contract was made, relieved himself from responsibility therefor (which is by no means admitted), then he acted in an inconsistent position as a director of Arctic, having to deal with the contract after it was made, since every question as to the fulfillment of the Oliver contract must, of necessity, be passed on by the Board of Directors of Arctic.

It is found in the facts certified that the leases under which Corrigan worked, were, from time to time, varied, and the amount due under the same remitted by the Board of Directors of Arctic, and with the other directors could not pay the full amount of royalties provided in said leases without losing money.

At the time the Oliver lease was made, and for five years thereafter, Mather and Hayden sat on the Board of Directors of Arctic, and with the other directors passed on and determined whether or not the various conditions of that contract were complied with. During all this time they were representing their principal, Cliffs, protecting its secretly-owned interest in the Oliver lease, while the other directors were purposely kept in ignorance of the fact that Cliffs had any interest in the Oliver lease; they were able by this secrecy and deception to enjoy the confidence of their fellow directors, and had the power to exert an influence to make Arctic more pliable in construing and dealing with the Oliver contract, for by this concealment and deception the other directors were likely to, and undoubtedly did, give to their arguments and suggestions weight and influence that a full disclosure of the truth would have prevented them from giving.

After about five years of this deception and concealment had elapsed, the other directors learned, in spite of the well-laid plans of appellants, that Cliffs held one-fourth interest in the Oliver lease. Even after this disclosure Mather and Hayden sat on the Board of Directors of Arctic until the death of Hayden, and Mather is still a director at this time, doing all that he can to embarrass Arctic, throwing every impediment in his power in its way, in its efforts to protect its rights against the fraud perpetrated on it by Mather and Hayden, and their principal, Cliffs. Mather and Hayden have been in no position, from the making of the Oliver lease until the present time, to deal fairly and impartially with Arctic and to protect its interests as against the Regent Mining Co., to whom the Oliver lease has been assigned.

Their duty was divided and fraud was perpetrated on Arctic so long as they or either of them remain on the Board of Directors of Arctic and have the power to deal with the lease theretofore made.

II.

Cliffs primarily responsible for the fraud committed, whether the same was actual or constructive.

The facts found show that Cliffs' stock was held in the name of Mather and Hayden, its President and attorney, and that they acted as directors in Arctic in accordance with the wishes, and by direction, and in the interest, of Cliffs. They were mere automatons for carrying out the will of Cliffs, and Cliffs is legally and equitably chargeable with full responsibility for the acts and conduct of Mather and Hayden as directors of Arctic. Cliffs acted in the only way a corporation can act, through agents.

These facts are not disputed, and appellants in their brief in the following words, assume the same:

> "Let us assume * * * that Mather was in a fiduciary relation and that the Cliffs Company was in law under the facts of this case in the same relation to the Arctic Company or to the Kaufman and Breitung interests, as Mather, and let us assume further that it became the duty of the Cliffs Company when Mather signed the lease to disclose to Kaufman and Breitung that the contract with the Oliver Company secured to the Cliffs an 'interest in the lease' and let us assume further that this duty was violated."

If, therefore, there was any breach of duty on the part of either Mather or Hayden in relation to the Oliver contract, Cliffs is chargeable with the same. This, of course, does not relieve Mather and Hayden from personal responsibility for their part in the fraud.

The facts certified show that there was a conspiracy in which they all participated, and each is chargeable with the acts of the other in consummating the object of the conspiracy.

The object of the conspiracy was to secure for Cliffs an unjust and inequitable proportion of the profits that should go to Arctic. The instruments used in effectuating the object were Mather and Hayden.

The plan for accomplishing the purpose embraced:

(1) Having on the Board of Directors of Arctic enough men who would take orders from and be controlled by Cliffs to block and prevent any action that did not make for the object of the conspiracy;

(2) To secure a lease for Cliffs at figures less than the values thereof, and, by means of its control of one-half of the Board of Directors, to be in a position to modify any condition of the contract or prevent enforcement by Arctic of any breach that was made for the advantage of Cliffs;

(3) To hold up and prevent a lease to anyone else until the object of the conspiracy (to wit, to secure an inequitable profit to Cliffs from the property and rights of Arctic) was attained;

(4) To be fully advised of all the plans of Arctic, and by this first-hand knowledge, to be in a position to thwart any effort to secure any profits that Cliffs might secure for itself;

(5) To secure secrecy and to mislead and deceive the other directors of Arctic.

The plan was admirably adapted to the accomplishment of the purpose. It had in it every element of confidence and trust and the most shameless betrayal of the trust imposed. It was calculated to lull to sleep the watchfulness of the other directors of the corporation. They were justified in relying on the good faith and integrity of their fellow-directors in dealing with the rights and property of the corporation of which they were directors. If they had been dealing with known expert "confidence" men they would, of course, have been on their guard. They supposed, and had the right to believe, that they were dealing with business men equally interested, through their principal, with them, in the profits of Arctic.

There is no rule of law or morals that requires one "To Treat Every Man as a Scoundrel Until He Proves Himself an Honest Man."

The directors put in the Arctic by Cliffs were understood by the other directors as there for the purpose of performing the duty that by law and good morals devolves on directors. The other directors had no reason to suspect that Mather and Hayden were put on the Board of Directors to secretly divert to Cliffs profits that Arctic should receive.

Appellants contend, however (page 23), that

> "it is not the violation of duty standing alone that gives relief in a case like the one at bar. The Cliffs must have received something in the nature of a bonus or gratuity which was the fruit of the violation of Mather's agency in relation to the

> Arctic, or which was the consideration paid for said violation, before it can be called to account."

The record discloses the fact that Cliffs received "in the nature of a bonus or gratuity" profits to the extent of about nine hundred thousand dollars as the "fruit of Mather's agency in relation to the Arctic," and which was the consideration paid for said violation of duty.

Success of the fraudulent efforts to make money is not necessary to make it a fraud in law. The position of appellants is not sound and will not bear analysis.

If the contention of appellants is sound, a corporation holding stock in another corporation may: (1) enter into a conspiracy against the interests of the corporation in which it holds stock; (2) put its co-conspirators on the Board of Directors; (3) use these co-conspirators for the purpose of securing profits to itself that should go to the corporation in which it holds stock, and therefore be distributed equitably to all the stockholders; (4) keep the same secret, and when the other directors discover the fraud, quietly say that they cannot be made to disgorge the dishonest profits secured by the successful operation of the conspiracy worked out with such adroitness and painstaking labor.

It is submitted that a mere statement of the position of the appellants is sufficient to cause wonder as to the mental and moral processes of those who permit counsel to seriously ask a Court of Justice to stultify itself by reversing the well settled rules of law and give judicial approval to such conduct as that certified by the court herein.

> "The fact that the validity of such a transaction is attempted to be sustained in courts of justice

> does not speak well for the state of the public conscience on the subject of loyalty to trust in business."

Lum v. *Clark*, 59 N. W., 662; 56 Minn., 278.

If equity will permit Cliffs "to get away" with the fruits of the conspiracy and fraud which this case discloses, then the word has lost its meaning. No court has been found, it is respectfully submitted, that will give its endorsement to such conduct as the facts certified by the Circuit Court of Appeals herein show appellants were guilty of.

Diligent as has been counsel for appellants their industry and ability have resulted in unearthing no case that gives approval to such conduct.

The facts found show that without Hayden's vote for the Oliver contract the same could not and would not have been made, and the Corrigan leases would have remained in force. Corrigan were paid $100,000 in ore, and relieved from the payment of $250,000 it owed Cliffs, as compensation to surrender their leases. This was a necessary step in carrying out the conspiracy entered into in connection with the Oliver leases. If the Corrigan leases had not been surrendered, Arctic would have received much more under the terms of these leases than it and Cliffs both received under the Oliver lease.

Cliffs was primarily responsible for the fraud committed, and it and its co-conspirators will be held responsible under the rules of equity for the profit received by this conspiracy and by the betrayal of confidence reposed in Mather and Hayden as directors of Arctic.

Appellants, in their brief, at page 9, attempt to escape responsibility for the conduct of Cliffs-controlled di-

rectors of Arctic, and shift the consideration of the issue of good faith of directors to consideration of the relation of stockholders to the corporation and fellow stockholders. With that purpose in view the brief says:

> "The Cliffs Company was a stockholder only in the Arctic Company. Stockholders sustain no fiduciary relation to each other or to the corporation."

Numerous cases are cited to sustain this position. Analysis of the opinion in these cases makes it clear that the injection of this contention in no way tends to throw light on the questions of law propounded to this court by the Circuit Court of Appeals, but is calculated, whether or not so intended, to becloud the issue and divert attention from the questions of law propounded.

The cases cited by appellants only give added emphasis to the contention of appellee that appellants have, through control of one-half the Board of Directors of Arctic, perpetrated a fraud on the corporation, and that equity will require Cliffs to disgorge the fruits of the fraud. The following extracts (italics ours) are illustrative of other cases cited:

U. S. Steel v. *Hodge*, 64 N. J. Eq., 807, 813:

> "There was an *entire absence* in the case of anything to show a *taint of fraud* or an *attempt to conceal* from the shareholders *any fact which should have influenced their action.*
>
> "That the entire proceeding was conducted with good faith, *without concealment* and with fairness to both parties is evinced by the fact that during all the litigation which has ensued, under the promotion of shareholders who did not attend the meeting, not one of the vast number

of shareholders who were present in person or by proxy, comprising men of great business capacity, interested to the extent of millions of dollars in the conversion plan, has questioned its propriety or expressed a desire, so far as appears, to recede from it" * * * (p. 812).

"The rule that *directors cannot lawfully enter into a contract, in the benefit of which even one of their number participates without the knowledge and consent of the stockholders, is so firmly entrenched in our jurisprudence that it is not open to debate.* * * *

"The rule is imbedded in our jurisprudence, and it cannot be too strongly stated or too rigorously applied. But in the cases cited the contract was made by the trustee *without the knowledge* or consent of the *cestui que trust* and without subsequent ratification or adoption by which the vice in it could be cured.

"The object of the rule is to prevent directors from *secretly* using their fiduciary position for their own emoluments, and not to impair the right of stockholders to enter into any lawful engagement with a *full disclosure of the facts.* * * *

"It is a settled rule of corporation law that *the personal interest of directors renders a transaction voidable* at the option of the stockholders and not void *per se*" (p. 813).

Windmueller v. *Distilling Co.*, 114 Fed., 491:

"I have not been referred to any authority which holds that one stockholder is in any sense a trustee for other stockholders, or that he is debarred from voting his stock according to what he may conceive to be his interest, or in a way which may result in a benefit to himself, and which other stockholders may not enjoy. *Directors, by whomsoever elected, are the representatives of all the stockholders, and as such are charged with the duty*

of administering the affairs of the company for the equal benefit of their cestui que trustent" (p. 494).

Rothschild v. *Memphis & C. R. Co.*, 113 Fed., 476:

"There is nothing in the proof in this case from which it can be found that the Southern Ry. Co. ever operated or controlled the property of the Memphis & Charleston R. R. Co., so that no mismanagement of its corporate affairs for the purpose of obtaining advantages at the expense of the minority stockholders can be attributed to it" * * * (p. 480).

"It is true that every transaction of a majority stockholder with the corporation will be viewed by the courts with jealousy, and set aside on slight grounds; but it is not void, and, if the relations of the majority stockholder are *fair* and *open*, there is no rule which forbids his dealing with the corporation, and no presumption that such dealing is fraudulent. The actual control of the property which is the basis in all the cases of the trust relation, not existing, and the sale not having been brought about by the fraudulent action of the defendant, it did not by its purchase become a trustee for the complainant and other stockholders" (p. 481).

III.

The law raises the presumption of fraud from the facts certified.

The statement of the Circuit Court of Appeals contains what may be designated as an analysis by the court of the questions of law propounded, in which the court expresses the opinion:

> "That there was no fraud or misleading and breach of directorship duty by Mather unless the same arose wholly as a matter of law, and as a presumption of law from the relations herein set out."

This is a mere expression of opinion and not a fact found or a conclusion of law, and should be so treated. The basis upon which stands the questions of law propounded by the Circuit Court of Appeals is the facts certified herein.

Appellee respectfully submits that the facts certified disclose *bad faith, misleading, and breach of directorship* by Mather, instituted by and for Cliffs.

Decisions of the court show conclusively that even if the opinion expressed by the Circuit Court of Appeals is justified by the facts certified (upon which said opinion purports to be based), the law raises the presumption of fraud from the facts certified.

A director of a corporation occupies a fiduciary relationship to the corporation and a violation of that relationship raises the presumption of fraud.

This action arose in the State of Michigan, and while the decisions of the courts of that state do not necessarily bind this court, they are entitled to great weight.

The courts of Michigan have spoken in no uncertain tone for the maintenance of good faith and the preservation of honesty and fair dealing by directors of corporations in the control and administration of corporations and the disposition of corporation property. The courts have contemptuously swept aside the appeal to fine-spun technicalities behind which bad faith and dishonesty seek to hide.

The decisions of the Supreme Court of Michigan beginning with the second report, disclose a perfect uni-

formity of the decisions of that high tribunal in insisting on the maintenance of this high standard of integrity.

The law as construed by the Supreme Court of Michigan.

In the report of the Supreme Court Decisions of the State of Michigan, published in 1854, the case of *Chute* v. *Barron* (2 Mich., 192) appears. This is an especially able and well considered opinion. The authorities are reviewed and freely quoted, from which it is clearly shown that the law raises the presumption of fraud from such facts as are certified in this record.

From the decision in that case the following excerpts are set forth to emphasize the position stated.

> "The subject of constructive frauds, which arise from some confidential or fiduciary relations between parties, is discussed with much learning and ability by Mr. Justice Story in his commentary on equity.
>
> "He deduces the following doctrine: 'That *whenever confidence is reposed, and one party has it in his power, in a secret manner, for his own advantage, to sacrifice those interests which he is bound to protect, he will not be permitted to hold any such advantage.*'
>
> "The doctrine thus broadly stated will necessarily include, not only trustees, but all others occupying a like relation" (p. 194).

The court quotes Mr. Justice STORY, in *Church* v. *Marine Ins. Co.* (1 Mason, 341):

> "The law will not suffer any man to earn a profit, or expose him to the temptation of a dereliction of his duty, by allowing him to act at the same time in the double capacity of agent and purchaser, either at a public or private sale" (p. 195).

The court quotes Mr. Chancellor KENT, in *Davoue* v. *Fanning* (2 Johns C. R., 251), as holding:

> "That *if a trustee, or person acting for others, sells a trust estate, and becomes himself interested in the purchase, the cestui que trusts are entitled of course, to have the purchase set aside;* and *it makes no difference* in the application of the rule, *that a sale was* at public auction, *bona fide*, and *for a fair price*, and that the executor did not purchase for himself, but a third person became the purchaser, to hold in trust for the separate use of the wife of the executor, who was one of the *cestui que* trusts, and had an interest in the land under the will of the testator.
>
> "If, in selling a part of the estate, in the meantime, for a legacy to his wife, he could become the purchaser on her account, or constitute an agent for that purpose, *the temptation to abuse that trust would be great and dangerous*" (p. 195).

The court quotes Lord COTTENHAM, in *Greenland* v. *King*, as holding:

> "That the principle was not confined to a particular class of persons, such as guardians, trustees, or solicitors, but was a rule of universal application to all persons coming within its principles, which is that no party can be permitted to purchase an interest where he has a duty to perform inconsistent with the character of a purchase" (p. 196).

The court quotes Lord ELDON, in *Ex parte Bennett* (10 Ves., 384):

> "The ground is, that though in the particular case there may be the most satisfactory evidence that the transaction amounts to no more than the general interest of parties requires that the solici-

tor is not to be permitted to purchase for himself or for another, as in several cases, *the power of the court would not be equal to protect it against deception, from the impossibility of knowing the truth in every case.* That, in truth, is the principle on which courts of equity have held that trustees shall not buy.

"If a trustee can buy in an honest case, he may, in cases having that appearance, but which from the infirmity of human testimony, may be grossly otherwise.

"If persons, having a confidential character, were permitted to avail themselves of any knowledge required in that capacity, they might be induced to conceal their information and not to exercise it for the benefit of the persons relying on their integrity. The characters are inconsistent."

Dwight v. *Blackman*, 2 Mich., 330:

"To secure fidelity to the trust, self-interest must not be allowed to come in conflict with integrity. Courts, by their decisions, should not allow persons to place themselves in a situation where the temptation to violate duty and conscience is so great. The evil can only be reached by the vigilance and firmness of our courts in applying to every case falling within the principle the rule established by the cases I have cited. Let it be once understood that in every case of a purchase by a trustee or agent, the question of *intent* or *fairness* is to enter into the discussion, and the result would prove disastrous to the interest of society. In many instances the powers of a court of equity (in the language of Lord Eldon) would not be equal to protect it against deception from the impossibility of knowing the truth in every case. Fraud would lurk in transactions which the eagle eye of the law could not detect" (p. 335).

People v. *Township Board of Overyssel*, 11 Mich., 222:

> "So careful is the law in guarding against the abuse of fiduciary relations, that it will not permit an agent to act for himself and his principal in the same transaction as to buy of himself, as agent, the property of his principal, or the like. *All such transactions are void*, as it respects his principal, unless ratified by him with a full knowledge of all the circumstances. To repudiate them *he need not show himself damnified. Whether he has been or not is immaterial.* Actual injury is not the principle the law proceeds on in holding such transaction void. *Fidelity in the agent is what is aimed at*, and as a means of securing it, the law will not permit the agent to place himself in a situation in which he may be tempted by his own private interest to disregard that of his principal. * * *"

Flint and Pere Marquette Ry. Co. v. *Dewey*, 14 Mich., 477, in 1866:

> "The defendant and Hazelton, President and Secretary of the company, with Drake, another director, are appointed a committee for the purpose of letting a contract for the construction and equipment of the road. It was their duty in letting the contract, to use their best efforts and their best judgment to promote the interest of the company by securing the best terms they could obtain for the company.
>
> "But * * * in the very act of letting the contract, they put themselves in the interest of the other contracting party by *clandestinely* joining with him in *taking the very contract they were employed to let*, and pretended to be letting for the company; a position in which it became their interest to let the contract for the highest price they could get it taken at, and on the best terms for themselves and their confederates. While they are

> pretending to let the contract for another, they are *surreptitiously* taking it, or a large part of it, in the name of another party. In the making of such a contract it may well be supposed that there would not be likely to be any serious difficulty in agreeing upon the terms. They would clearly *have it in their power to afford to the party nominally taking the contract advantages of considerable value*, as well to him as to themselves. * * *
>
> "It is possible there may have been no actual fraud, and that the contract could not have been let on better terms, but the principles of law applicable to such a contract renders *it immaterial*, under the circumstances of this case, *whether there has been any fraud in fact, or injury to the company*" (p. 486).

McKay v. *Williams*, 67 Mich., 547, is an action to repudiate a deed made by an attorney in fact for his own benefit. The court quotes from *People* v. *Township Board of Overyssel*, 11 Mich., 222, and says:

> "Such a transaction cannot stand. It bears on its face its own condemnation. * * * Public policy will not tolerate such misdoing on the part of an agent, and *courts will not stop to inquire whether a fraud was intended*, but looking alone at the relation of the parties will, *upon that relation appearing*, declare the *conveyance invalid*."

McNutt v. *Dix*, 83 Mich., 328, 10 L. R. S., 660:

> "The wholesome rule of law is one that applies to all transactions of this (fiduciary) character, and *courts will not stop to inquire as to motive* or intent of parties in particular cases where it appears that the rule has been violated" (p. 333).

The law as construed by the Supreme Court of the United States.

The decisions of the Supreme Court of the United States are clear and cogent in sustaining this doctrine that demands good faith and fidelity from directors and others occupying fiduciary relationship.

Jackson v. *Ludeling*, 21 Wall. (U. S.), 616:

> "The officers of a company where capital is contributed in shares, are, in a very legitimate sense, trustees alike for its stockholders and its creditors, although they may not be trustees technically in form."

Wardell v. *Railroad Co.*, 103 W. S., 651:

> "The law, therefore, will always condemn the transaction of a party on his own behalf when in respect to the matter concerned he is the agent of others and will relieve against them whenever their enforcement is seasonably resisted. *Directors of corporations* and all persons who stand in fiduciary relation to other parties and are clothed with power to act for them, are subject to this rule; they *are not permitted to occupy a position which will conflict with the interest of the parties they represent,* and are bound to protect. They cannot, as agents or trustees, enter into or authorize contracts on behalf of those for whom they are appointed to act, and then personally participate in the benefits" (p. 658).

McGourkey v. *Toledo & Ohio Ry.*, 146 U. S., 536:

> "No principle of law is better settled than that any arrangement by which directors of a corpora-

tion becomes interested adversely to such corporation in contracts with it, or organize or take stock in companies or associations for the purpose of entering into contracts with the corporation, or become parties to any undertaking to secure to themselves a share in the profits of any transaction to which the corporation is also a party, will be looked upon with suspicion. * * * A contract of this kind is clearly voidable at the election of the corporation."

The law as construed by other courts of the United States.

The decisions of the lower United States Courts are in thorough harmony with the decisions of the Supreme Court. A few citations of, and excerpts from the opinions of these courts may be helpful in showing the complete unanimity of the courts in demanding and enforcing observance of the duty of maintaining inviolate fiduciary relations.

In the case of *Chandler* v. *Bacon*, 30 Fed., 538, the defendants were promoters of the National Color Printing Co., and as such promoters negotiated, in behalf of the National Printing Co., which was to be formed, with the owners of certain patents, by which the defendants were to receive certain shares of the capital stock of the new company, the balance of the shares being offered to the public, disclosing the fact of the purchase of the patents and that a portion of the stock of the company was to be issued to the owners of the patents in part payment therefor, but not informing the persons who subscribed for the stock that the defendants were to have stock on any different terms or conditions.

Holding the defendants liable to account for the stock, the court says (pp. 539, 540):

"The question before us now is not whether these shares are to be considered as full paid stock, but whether these defendants, as promoters of the new company, could take them without consideration, while other stockholders paid seven dollars per share. Clearly, they could not lawfully do this. As promoters of the new company they occupied a *fiduciary relation* towards it similar to that of agent to a principal, and they *had no right* in these negotiations to derive any advantage over other stockholders *without a full and fair disclosure* of the transactions, and any secret profits so made they must refund to the company. That this may have been done without any fraudulent intent, or that the price paid for the patents was fair and reasonable, cannot relieve these defendants. *The law forbids them, from their position, to secretly derive any benefit over other stockholders,* and makes them accountable to the company for any profit so derived."

In *McKinley* v. *Williams*, 74 Fed. 94, the court says:

"The law guards the fiduciary relations with jealous care. It seeks to prevent the possibility of a conflict between duty and the personal interest of a trustee. It demands that an agent shall work with an eye single to the interest of his principal. It prohibits him from receiving any compensation, but his commission, and forbids him from acting adversely to his principal, either for himself or for others. It visits such a breach of duty, not only with the loss of the profits he gains, but with the loss of the compensation which the faithful discharge of duty would have earned. To permit the agent of the vendor to become interested, as the purchaser or as the agent of a purchaser, in the subject matter of the agency, inaugurates so *dangerous a conflict between duty and self-interest,* that the law wisely and peremptorily prohibits it.

> An agent of a vendor, who speculates in the subject matter of his agency, or intentionally becomes interested in it as a purchaser, or as the agent of a purchaser, violates his contract of agency, *betrays his trust*, forfeits his commission as agent, and *becomes indebted to his principal for the profits he gains by his breach of duty.*"

The court cites:

> *Warren* v. *Burt*, 58 Fed., 101;
> *Gunn* v. *Black*, 60 Fed., 151;
> *Michoud* v. *Girod*, 4 How. (45 U. S.), 503;
> *Crump* v. *Ingersoll*, 46 N. W. (Minn.), 141;
> *Hegenmyer* v. *Marks*, 32 N. W. (Minn.), 785;
> *Jacobus* v. *Munn*, 37 N. J. Eq., 48;
> *Moore* v. *Zabriskie*, 18 N. J. Eq., 51;
> *Perry, Trusts*, No. 919;
> *Bank* v. *Terrell*, 27 Beav., 273; 10 H. L. Cas., 26;
> *Panama & S. P. Tel. Co.* v. *India Rubber, Gutta Percha & Tel. Works Co.*, 10 Ch. App., 515;
> *Bent* v. *Priest*, 86 Mo., 475.

After citing with approval these cases the court further says:

> "This is not the first time this court has been called upon to announce these principles, but the *reckless disregard* of them, which characterizes the acts of some of the agents whose transactions are portrayed to us, admonishes us that we cannot reiterate them too often, nor enforce them too rigidly."

The law as construed by the courts of different States.

The decisions of the courts of different states are in accord with the decisions of the Federal courts, and, with perfect unanimity enforce in the strongest possible language the rule of good faith in all fiduciary relationships. They give to the injured party redress by rescinding the contract or treating the fiduciary guilty of fraud (either actual or constructive) and hold him as a trustee for the benefit of those that the law makes his *cestui que* trusts.

Duncomb v. *N. Y. H. & N. R. R. Co. et al.*, 84 N. Y., 190:

> "The right of the beneficiary (under contract made in which the director is interested adversely to his company) or those claiming through him * * * does not depend upon the question whether the trustee in fact has acted fraudulently, or in good faith and honesty, but is founded upon the known weakness of human nature and the peril of permitting any coalition between the personal interests of the individual and his duties as trustee in his fiduciary character."

Jacobson v. *Brooklyn Lumber Co.*, 184 N. Y., 152:

> "The relations of an officer of a corporation to it is fiduciary * * *. The relation is such that an officer of a corporation cannot make an agreement with himself, acting on the part individually and for his own benefit, and on the other part, in his fiduciary capacity as an officer of the corporation."

Sage v. *Culver*, 154 N. Y., 241:

> "When a trustee or other officer or director of a corporation deals with himself as an indi-

vidual, or in the character of trustee, director or officer of another corporation with respect to the funds, securities or property of the corporation, the transaction is at least open to question by the corporation, or, in a proper case, by its stockholders, and the *trustee is bound to explain the transaction and show that the same was fair and that no undue advantage has been taken by him of his position for his own advantage or the advantage of some other corporation in which he has interest.*"

Gilman v. *Kelly*, 77 Ill., 426:

"In this case contract was made by directors of the railroad company with the Improvement Company for the construction of the railroad company's railroad. Afterwards three of the directors of the railroad company became directors of the Improvement Company. Suit was brought by Kelly, as stockholder of the railroad company, to have the contract declared illegal and for an accounting by the said three directors and by the Improvement Company for profits realized by them. *The Court found as a fact that there was no fraud in the making of the contract and that it was entered into in good faith with the Improvement Company.*"

"The vital question is whether it was lawful for any number of the directors of the railroad company to become members and stockholders in the Morgan Improvement Co., with whom they had a construction contract. Whether the contract was originally valid is not an important subject of inquiry, for *it was illegal for the directors to become members of the Construction Co., and participants in the profits, if any should be realized*" (p. 432).

"The directors of a railroad company are in an important sense regarded as trustees for the

stockholders, and it would be a breach of duty to transfer that trust; to assume obligations inconsistent with that relation * * * The rule is the same that applies to all persons acting in any fiduciary capacity that requires the utmost fidelity to the interests of the *cestui que* trust. *The rule in its general sense embraces every relation in which there may be any possibility arising of conflict* between the duty of the person with whom the trustee is dealing, or on whose account he is acting, and his own individual interest * * *. *It operates to restrain all agents or trustees, public or private. The inquiry is not whether the contract the trustee has made is the best that could have been made for the cestui que trust, or whether it is fraudulent in any way.* So strictly is this principle adhered to that *no question is allowed to be raised as to the fairness of the contract.* The principle has a broader scope. The law has absolutely prohibited the agent or trustee from placing himself in a position where his own private interests would naturally tend to make him neglectful of his obligation to his principal, or where his position would afford him an opportunity to speculate in the trust property. Accordingly, it is not indispensable that there should be actual injury before the act of the trustee will be declared void, as being interdicted by the policy of the law. The *cestui que* trust has his election to ratify the act of the trustee and insist upon all the advantage of it, or disaffirm it in toto, as shall be most to his interest" (p. 434).

Hoyle v. *Plattsburgh & Montreal R. R. Co.*, 54 N. Y., 314:

"He (a director of a corporation) falls * * * within the great rule by which equity requires that confidence shall not be abused by the party in whom it is reposed and which it enforces by imposing the disability, either partially or completely,

upon the party intrusted to deal on his own behalf in respect to any matter involved in such confidence * * *. *Nor is it possible to limit the duty of a director of a corporation* in this respect to the time while he is acting as a director under any special delegation of power, or is in attendance at the meetings of the Board. Such a limit would deprive the rule of almost all its efficacy and would facilitate innumerable evasions of its force. * * * *He cannot, while director, divest himself of the knowledge which he has acquired in confidence of corporate affairs or of the value of corporate property, nor be allowed to use it to his own advantage.*"

Bird Coal & Iron Co. v. *Humes*, 27 Atlantic, 750 (Pa.), cited in appellant's brief, was an action for an accounting. The complainant leased its coal mines to the lessee for a term of years at a royalty of fifteen cents a ton for the coal mined. Defendant Humes was then a large holder of stock in the complainant company and brought suit to have the lease cancelled on the ground of gross inadequacy of consideration. The lessee procured the discontinuance of the suit by a secret arrangement to pay Humes a royalty of three cents a ton on all the coal mined. Afterwards Humes became a director in the company and within a month following, on the application of the lessee and by the recommendation of Humes as director, a reduction of twenty per cent was made of the royalty the lessee was paying to the company. The company then had no knowledge that the lessee was paying the three cents royalty to Humes.

The Court held Humes liable to account to the company for the profits made by him in the receipt of this royalty after he had become a director, making a distinction between the receipts of the royalty while he was

a stockholder and his receipt of royalty while he was a director.

The Court says:

> "But *a director is a trustee for the entire body of stockholders*, and both good morals and good law imperatively demand he shall manage all the business affairs of the company with a view to promote not his own interests but the common interests; and *he cannot, directly or indirectly, derive any personal profit or advantage by reason of his position, distinct from his co-shareholders.* 1 Potter, Corp. par. 330; Nor. Priv. Corp., 517, 518. And by assuming the office, he undertakes to give his best judgment in the interests of the corporation in all matters in which he acts for it, untrammeled by any hostile interest in himself or others. *There is an inherent obligation on his part that he will in no manner use his position to advance his own interest as an individual, as distinguished from that of the corporation.* Coal Co. v. Parish, 42 Md., 598; Hill v. Frazier, 22 Pa. St., 320. And *all secret profits* derived by him in any dealings in regard to the corporate enterprise *must be accounted for* to the corporation, even though the transaction in which they were made also advantaged the corporation of which he was director" (p. 752).

Dutton v. *Willner*, 52 N. Y., 312, was an action brought to compel the defendant to account for certain moneys alleged to have been received by him as agent.

The Court uses the following language:

> "It is a well settled and salutary rule that 'a person who undertakes to act for another in any manner shall not, in the same matter, act for himself.' It is only by a rigid adherence to this simple rule that all temptation can be removed from one

> acting in a fiduciary capacity to abuse his trust, or seek his own advantage in the position which it affords him. One consequence of a violation of the rule is that *the agent must*, at the option of his principal, *account* to him *for profit he may have made by the transaction.* * * * All profits and every advantage beyond lawful compensation made by an agent in the business, or by dealing or speculating with the effects of his principal, though in violation of his duty of agent, and though the loss, if one had occurred, would have fallen on the agent, are for the benefit of the principal" (pp. 318, 319).

Cottom v. *Holliday*, 59 Ill., 176, was an action to recover money received by the defendant from the plaintiff for the purchase money of a tract of land bought by the defendant as plaintiff's agent, which was in excess of the actual purchase price.

The Court uses the following language:

> "The duties and obligations of an agent are such that he *cannot avail himself of any advantage his position may give him to speculate off his principal. All the profits or advantages gained in the transaction belong to the principal.* The law will not permit the agent, without the assent of his principal, to acquire an interest in the subject matter of the agency adverse to that of his principal. He must act solely for the interest of his principal while executing the trust" (p. 179).

In *Yale Gas Stove Co.* v. *Wilcox*, 29 Atl., 303 (64 Conn., 101), the Court says:

> "In case of wrong dealing by a trustee, the rule is, when the facts come to the knowledge of the *cestui que* trust, *he may either affirm or repudiate the transaction*, and if he does the former, he may yet *recover secret profits.*"

In *Wayne Pike Co.* v. *Hammons*, 27 N. E., 487 (Ind.), the Court says:

> "It is elementary that all who participate in the perpetration of a fraud are to be regarded as principals. The defendants are, therefore, liable for the amount which was realized by Goodrich by reason of the fraud. This being so, and the facts not being in dispute, the Court properly charged the jury to find a verdict in favor of the plaintiff for $5,750, being the amount realized by Goodrich for his own benefit out of the transaction.
>
> "* * * *If the appellants conspired together for the purposes alleged in the complaint, each became liable for any act done by one of the three in furtherance of the common design.* By the act of conspiring together the conspirators assumed to themselves the attribute of individuality, so far as regards the prosecution of the common design, thus rendering what was said of or done by anyone in furtherance of the design the act of all."

Emery v. *Parrot*, 107 Mass., 95, was an action against Parrott and Head to recover secret profits. Parrott occupied a fiduciary relationship to complainant; Head did not. The Court adjudged Head to account for the stock received by him.

The Court says:

> "The case of the defendant Head stands somewhat differently, but is governed by the same principles. He *did not stand in any fiduciary relation to the plaintiffs; but he knew the position of Parrot, and became the partner of Parrot,* uniting with him to effect a sale of the property to Parrot and the plaintiffs, for the sake of dividing with Parrot the secret commission which the owner of the property had agreed to pay for effecting the sale. *He*

> *was fully cognizant of the illegal conduct of Parrot, and co-operated with him in inducing the plaintiff to make the purchase.* He participated in the profits of the transaction; and the Courts are of the opinion that *he* as well as Parrot *must disgorge the secret gain which they thus jointly obtained and divided with each other*" (p. 100).

Paducah Iron Co. v. *Hays,* 24 S. W., 237 (Ky.) is a case in which the owners of certain iron lands, three of whom were directors of the Iron Company, sold the lands to the company for which stock of the company was issued, and certain shares set apart for those owners of the lands who were directors, and certain other directors of the company. Hays was induced to become President of the company with an agreed salary, and on condition that he be furnished a block of the stock of the company.

In the suit which was brought to recover for Hays' salary, the Court held that the stock belonged to the company, and that Hays, although *innocent of any wrong* in the procurement of the shares obtained by him, having become President of the company and having had opportunity to know of the manner in which such shares were issued, *must account to the company for their value.*

Parker v. *Nickerson,* 112 Mass., 195, was an action by the Receiver of a corporation to recover secret profits made by the defendants, who were directors of the company, in a sale by them of boats to the company.

The Court says:

> "As a general rule, a trustee or agent cannot purchase on his own account what he sells on account of another, nor purchase on account of another what he sells on his own account. He cannot unite in himself the opposite characters of buyer and seller. And if he does so, *the cestui que trust*

or principals, unless upon the fullest knowledge of all the facts he elects to confirm the act of the trustee or agent, may repudiate it, or he *may charge the profits made by the trustee or agent with an implied trust for his benefit"* (p. 196).

IV.

The Arctic is a corporation and is subject to the law regulating corporations, and must be so treated.

Appellants practically base their defense in this action on the position stated under the head of "Estoppel," on page 5 of the brief:

> "It is clear that each side treated the title held by the Arctic just as if it was owned one-half by each, and each side in respect to the new lease was inspired by motives of independent interest or feeling aside from the interests of the Arctic and negotiated with the Oliver in respect to the transaction untrammeled by any nominal directorship relation. Kaufman and Breitung never made any inquiry in respect to the terms of the contract which the Cliffs and the Oliver had entered into."

As authority for this position they cite:

> *Breslin* v. *Fries-Breslin Co.,* 70 N. J. L. 274, 281, 284;
> *Beardsley* v. *Beardsley,* 138 U. S., 262.

It is fair to assume that these two cases are the strongest and most convincing that counsel can find in support of their contention.

The weakness of this contention is made manifest by analysis of these cases.

Breslin v. *Fries-Breslin Co.* (*supra*), is a case in which the statutory requirements as to declaring dividends were not complied with, but the "dividends" were set apart on the books as such and every stockholder agreed and acquiesced. The Court holds that the stockholders are estopped to deny that the dividends so set apart are dividends in fact.

This is very different from the effort of appellants to use this case as authority for their contention that if the stockholders have failed to observe all the statutes regulating corporations, that thereby the corporation—the legal entity—goes out of existence.

This case is cited by appellants as authority for that position, but it is in fact the strongest possible authority in answer to appellants' contention, for it is perfectly clear that while the failure to observe statutory requirements regulating corporations, that such failure when assented to by all the stockholders, does not affect the validity or existence of the corporation.

Beardsley v. *Beardsley* (*supra*), is a case in which two brothers were the sole owners of a corporation, which, having graded the road bed, entered into a contract with appellant, one of the brothers,

> "for the completion and equipment of the road, the consideration of which contract, on the part of the railroad company, was, among other things, the transfer, practically, of the entire stock in the company to appellant."

This stock was issued to appellant and an associate, and appellant afterwards made a contract with his associate for two-thirds of his associate's stock. The two brothers worked on the road. Two corporations were organized, one looking to the extension of the road eastward, and the

other to a like extension westward. The brothers (appellant and appellee) worked together in constructing the road until differences arose between them. Appellee contends that they were joint owners and that he was the owner of one-third of the road.

In sustaining the contention of appellee, the Court says:

> "It is difficult to believe that, by this transaction, nothing more is meant than a transfer of stock. Obviously he understood that two-thirds of Alderman's interest passed to appellee. * * * Would equity tolerate any transaction by which appellant, securing the influence of a few shares of stock held by the nominal directors, should obtain bonds or contracts by which the value of the stock would be substantially destroyed, and he become the real owner? Bonds issued might be valid in law, and apparently prior to the stock; contracts might give superior rights; yet is it not clear that equity would interfere if he, by collusion with the resident directors, attempted to ignore Alderman and create in himself a supremacy of ownership? That which is true when there was equality of ownership between himself and Alderman is also true when, by a subdivision of Alderman's interest, a like ownership as between himself and his brother was established on a different basis" (p. 270).

This case, instead of being an authority for appellants, in so far as the same sheds light on this case, illumines the contention of appellee that equity will not permit one to use a fiduciary relationship and the trust thereby secured for personal advantage and in this way secure interests in which others to whom he owes duty of protecting their interest do not participate. Certainly, it is no

authority for the position that fiduciary relations are relieved from the trust and confidence inherent in such relationship, because the statutes regulating corporations are not in all respects strictly complied with.

Under the same head of "Estoppel" appellants, in referring to Rule 239 (under which this case has been certified to this Court) at page 9, defines the law in these words:

> "Each question must be answered in the light of the facts set forth."

It is submitted that this definition of the rule is not complete, and conveys a misconception of its purpose and scope.

The brief cites, however, a case which makes the rule clear, and while disagreeing with appellant in its definition of the rule, appellee agrees with it that the case cited correctly states the rule.

The brief cites *Stratton's Independence* v. *Howbert*, 231 U. S., 399, in which the Court says:

> "It is established that in the exercise of this jurisdiction this Court, unless it see occasion to require the whole record to be sent up for consideration, is to make answer respecting the several propositions of law that are certified, and it is not to go into questions of fact, or of mixed law and fact. Our rule requires that the certificate shall contain a proper statement of the facts upon which the questions of law arise, and we deal with the facts as thus certified, and not otherwise" (p. 422).

Graver v. *Faurot*, 162 U. S., 435, 437;
Cross v. *Evans*, 167 U. S., 60, 63;
U. S. v. *Union Pacific Ry.*, 168 U. S., 505, 512;
Cincinnati, Hamilton RR. v. *McKeen*, 149 U. S., 259.

V.

Are the hands of Kaufman and Breitung unclean, and if so, does the fact deprive the Arctic of the right to appeal to a court of equity to redress a wrong done to, and a fraud practiced on, the corporation?

Appellants insist that this action cannot be maintained for the reason that it is in conflict with the equitable maxim: *"HE WHO COMES INTO EQUITY MUST COME WITH CLEAN HANDS."*

Two of the questions propounded by the Circuit Court of Appeals, which clearly present the application of this rule of equity to the facts certified herein, are:

> "2A. Does the conduct of Kaufman and Breitung, in insisting upon benefit to their outside interests as a condition of their consent to the lease, bar them, in their own names or in the name of the Arctic, from complaining in a court of equity of the conduct of Cliffs in insisting upon benefit to its outside interests as a condition of its consent to the lease?" Or—
>
> "2B. Did their conduct pertain to a matter so distinct from that conduct of Cliffs of which they complain that the rule of clean hands does not apply?"

The facts certified, on which rests the application of the equitable doctrine of "clean hands" are stated in finding of fact 14, which is that "in closing the terms of the lease with Oliver," Kaufman and Breitung "insisted as a condition of making the lease, that Oliver should buy" certain interests held by them individually. "Kauf-

man and Breitung did not disclose to Cliffs that they were making this sale in connection with the lease, but the Cliffs learned this fact from Oliver" before the lease was made and "acquiesced"; and finding of fact 12, which is that "Kaufman and Breitung insisted on many concessions, and in the end *procured the best terms in all respects for the Arctic* that could have been procured from the Oliver or anyone else."

Does the fact that a director of a corporation makes sale of personally owned property to one who is contracting with the corporation as a condition for making "the best lease for the corporation that could have been made," when the fact of the sale of the personally owned property in connection with the lease was known and acquiesced in by every stockholder of the corporation before the lease was made, brand such a director as having hands so unclean that the corporation of which he is a director and officer will be excluded from a hearing in the Courts of Equity?

The facts certified show that there was no concealment or secrecy; that before the Oliver contract was consummated, every fact in relation to the sale of this land owned by Kaufman and Breitung personally, was fully known, understood, and acquiesced in by everyone owning any stock in Arctic, and that Kaufman and Breitung, as directors of Arctic, secured for the corporation "*the best lease that could have been secured.*"

The facts found exclude any inference of fraud, either constructive or actual, and yet, in the face of these findings of fact, appellants ask to close the Courts of Equity to Arctic for that Kaufman and Breitung were directors.

To exclude appellee from the Courts of Equity, it is

necessary to conclude the opposite of the facts found, and, without facts upon which to base such conclusion, to determine that Kaufman and Breitung were guilty of conduct that was iniquitous and fraudulent in selling their personally owned property to Oliver. In relation to this property they sustained no fiduciary relationship to Arctic. It was theirs to do with as they pleased. They could sell or refuse to sell as they saw fit, and no one else had the right to complain.

To close the door of the Courts of Equity it is not sufficient to find that their conduct was inequitable, for then the Courts would hear them, but would require them to do equity to their adversary.

As a basis for the conclusion contended for by appellants, the Court would be driven to the necessity of finding:

(1) That Arctic was not a corporation;

(2) That those who are designated as stockholders and directors in Arctic are, in fact, tenants in common, and that the acts of each must be treated as entirely independent of the acts of the others;

(3) That there was no fiduciary relationship between the tenants in common;

(4) That because two of the tenants in common insisted that they would not sell their interest in the joint property unless the purchaser would take certain property owned by them individually at a price which the Master finds was more than its market value, that they are guilty of iniquitous conduct;

(5) That the fact that the other tenants in common used the confidence that the supposed relationship of

fellow-directors give by means of which to secure profits that should have gone to all the tenants in common, and that they could not have secured but for this supposed fiduciary relationship, and the confidence and trust that goes with it, and because of the secret and unfair method by which the same was worked out, are all immaterial and cannot be considered in this case;

(6) That Kaufman and Breitung come into Court with unclean hands;

(7) That Arctic is so besmirched with the unclean hands of Kaufman and Breitung that it has no standing and cannot be permitted to be heard in a Court of Equity.

In other words appellee would be treated as were lepers of old when they were driven out into the desert, and in this case, Cliffs and Mather would be acting as high priests holding up hands of horror and crying "Unclean! Unclean!"

The maxim "*He who comes into equity must come with clean hands*" is based on the presumption that the person seeking redress in a Court of Equity has already committed iniquity, and relief on any terms is forbidden him. "This maxim is entirely distinct from and more comprehensive in its results than that requiring one who seeks equity to do equity," which presumes the right to relief "and merely requires as a condition of obtaining it, that he accord corresponding rights to his adversary" (*Kinner* v. *Lake Shore RR.* (Ohio), 69 N. E., 614).

But appellants contend that because the Master herein found that the price received by Kaufman and Brei-

tung for their personally owned property was more than the reasonable market value thereof, that this finding of itself fixes Kaufman and Breitung as guilty of iniquitous conduct, and automatically under the equitable doctrine "*He who comes into equity must come with clean hands,*" denies to the corporation of which they are directors the right to be heard in a Court of Equity.

The fact is found herein that at the time the Oliver lease was made that *good business judgment dictated* its acceptance by the Arctic, whereas other facts found show that in the light of conditions subsequently arising, *the rejection of the Oliver lease by Arctic would have shown good business judgment, and the retention of the Corrigan leases would have shown far better business judgment*, because the returns therefrom would have been far in excess of that received from the Oliver lease.

Men are not lightly branded by Courts of Equity as having unclean hands. Differences of opinion as to the value of property (especially of minerals uncovered in the earth), are not sufficient basis upon which to deny access to Courts of Equity.

The equitable maxim "*He who comes into equity must come with clean hands*" has, with the passage of time, grown to have the force of law, and become an instrument for securing justice. It was never intended to be used as a fence behind which those who betray trust reposed in them could hide and escape with the fruits of the fraud and deception perpetrated by them. This maxim is attempted to be used in this case as a shield and protection by those who have reaped rewards from the betrayal of the trust inherent in a fiduciary relationship. The Courts will not permit this rule of equity to be prostituted for any such purposes.

Appellee submits that the "unclean hands" maxim has no place in this action.

In the bill of complaint herein filed, appellee offered to take, at the actual legitimate cost to the appellants, all of the benefits and burdens of the bargain, Arctic to be placed in appellants' "boots" on reimbursing them. It offered to take the fee they purchased from Kaufman and Breitung at the price actually paid for it, regardless of its true value. The judgment allowed them to do this and was reduced by the exact amount paid for this fee.

The Court finds no fraud, either constructive or actual, on the part of Kaufman and Breitung, in the sale of their personally owned property in connection with the Oliver lease, but finds affirmatively that the Oliver lease was the best lease for Arctic that could have been secured at that time.

Appellants ask to take advantage of appellee's presence in the Court for one purpose, and then ask that it be treated as if it were not in the Court at all, and ask the Court to find that its hands are so unclean that it will not be permitted to pollute by its presence in the Court the same air breathed by Cliffs and Mather.

The maxim as construed by the Courts sustains appellee's position that it has no application to the facts as found in this case.

Appellee contends that the maxim relied on by appellants as a basis upon which to exclude appellee from Courts of Equity has no application to the facts of this case. The foregoing analysis of the facts found by the Court make this clear. The text books and the decisions of the Court in construing this maxim demonstrate that

the contention of appellants that the door of the Court of Equity is closed to appellee is untenable.

This maxim is thus defined in "Words and Phrases" at page 735:

> "The maxim 'One Who Comes into Equity Must Come with Clean Hands' is based upon conscience and good faith, and the *bad faith* or the *unconscionable conduct* that will justify the application of this maxim must be based upon *actual knowledge* or *wilful fraud.* * * * 'Unclean hands' within the meaning of the maxim of equity, is a figurative description of a class of suitors to whom a Court of Equity as a court of conscience *will not even listen,* because the *conduct of* such suitors is itself *unconscionable* in the moral sense that imports actual knowledge."
>
> "The maxim 'He Who Comes into Equity Must Come with Clean Hands' expresses rather a principle of inaction, than of action, and means that equity refuses to lend its aid to one seeking its active interposition who has been guilty of unlawful or inequitable conduct in the matter in relation to which he seeks relief."

Bouvier's Law Dictionary thus defines the maxim, at page 502:

> "It is said that a party seeking the aid of a Court of Equity must come into Court with clean hands. It refers only to wrongful conduct in the particular acts or transactions which raise the equity he seeks to enforce."

In *Trice* v. *Comstock,* 121 Fed., 620, 61 L. R. A., 176, at page 181, the Court says:

> "It is contended, however, that the complainants are entitled to no remedy in equity because

they have been guilty of iniquity. It is said that their plan of obtaining from owners options to purchase their lands at fixed prices, of then selling at an advance, and retaining the profits, and of obtaining agreements from owners that they might sell the lands at a price above that fixed in the contract, and retain the balance for their compensation, was reprehensible, and that they conspired with Bowling to induce Reid and Green to sell their lands at a low price. There are two sufficient answers to these arguments. They are: (1) that the record discloses nothing unfair or inequitable in the plans or acts of the complainant; and (2) that the acts to which defendants object neither conditioned nor affected the equity which complainants now seek to enforce. *There was nothing evil in itself, forbidden by law, or obnoxious to the strictest rules of fair dealing* in the plan of business which the complainant had adopted. It contemplated *no deceit* of the owners' land. In each case these *owners* were completely *informed*, either that the complainant proposed to buy their property at the prices at which the owner fixed and make a profit for themselves by selling it again at a higher price, or that they proposed to sell the lands at as high a price as they could obtain, to return to the owners the price which the latter fixed, and to retain the difference as their profit in the transaction. There is *no suggestion of inequity, injustice* or *unfairness* in such a method of dealing. Larow v. Bozarth, 68 Mo. App., 406.

"*Nor was there anything reprehensible* in the endeavors of complainants to obtain from the owners of the land here in controversy a contract for their purchase at the lowest possible price. * * * Moreover, if the charge which defendants make against the complainants were true, they would constitute no defense to this suit. Their alleged defenses were not against the defendants,

but against the former owners of this property. These owners have made no complaint and their rights and remedies are not here in question. The only issue here is whether or not the constructive trust caused by betrayal of confidence by the agent Comstock shall be enforced. General inequitous conduct, reprehensible acts towards third parties, do not deprive a suitor of his right to justice in a Court of Equity. Wrongful conduct in the very act or matter which constitutes the complainant's ground of action, and that alone, will repel from a Court of Equity on the ground that 'he who comes into equity must do so with clean hands.' *This rule does not disqualify any complainant from obtaining relief who has not dealt unjustly in the very transaction concerning which he complains.*"

West v. *Washburn*, 153 App. Div., 460, 138 N. Y. Supp., 230, is an action in equity in which the plaintiff seeks to prevent the attachment of alimony due from a divorced husband, for the payment of a judgment against plaintiff as damages for alienating the affections of another woman's husband. In discussing the effort to invoke the maxim that "he who comes into equity must come with clean hands" the Court said:

"The action is in equity, and the defendant insists that the plaintiff must come into court with clean hands. If the moving affidavits in the attaching creditor's action are to be taken as true, the present plaintiff would seem quite immoral, and it would be quite impossible to characterize her hands as clean. While equity does not employ itself in settling quarrels amongst rogues, still a rogue may have a clean cause of action, and it is with reference to the cause of action which he produces that the maxim of clean hands applies. So

> far as the present action is concerned, the plaintiff was entirely within her rights in asking that the $1,500 of alimony be relieved from the levy of the attachment."

The jurisdictional question attempted to be raised by appellants as to the method of bringing this suit is not raised by the questions of law propounded.

Appellants in their brief (p. 37) attempt to inject into question 2 a jurisdictional question that the Court did not embody therein. The question as propounded by the Court is based on the equitable doctrine that "He Who Comes Into Equity Must Come With Clean Hands." Appellants in their brief attempt to invoke the technical rules of law as to the method of bringing suit to redress a wrong suffered by a corporation. They say:

> "The case at bar, while nominally in the name of the Arctic Company, was not instituted by the corporation, but by Kaufman and Breitung."

and lay down the proposition that

> "primarily a suit to recover for a wrong done to a corporation must be brought by the corporation itself. No stockholder may institute such an action until he has exhausted every available means to get the corporation to bring the suit."

The facts are that this action was brought by the corporation, acting through its President and another director, and that they constituted one-half of the Board of Directors. Those who constituted the remaining directors are charged with the betrayal of fiduciary relationship, and defendants Cliffs and Mather (through

his stock ownership in Cliffs), it is submitted, received whatever benefit accrued from such betrayal. It controls one-half of the Board of Directors of Arctic. According to the contention of appellant without the consent of Cliffs and the directors by it controlled, the corporation could not institute this action. They contend that Cliffs could, by a fraud perpetrated on the corporation through its control of one-half of its board of directors, appropriate the proceeds of that fraud and conspiracy, defy the officers of the corporation, have its automatons refuse to perform the duty of directors which they assumed, and thereby prevent the corporation it has injured from having a Court of Equity pass on the right of the corporation to recover the proceeds of the fraud perpetrated on the corporation.

A mere statement of the position is sufficient to demonstrate its unsoundness. The question here raised is a perversion of the question of law propounded by the Court in Question No. 2a.

On page 30 of appellants' brief, appellants admit that if this action should be treated as one instituted by Kaufman and Breitung,

> "that the Court below decided to retain and not dismiss this action, but to treat it as if brought by Kaufman and Breitung individually in their own names. *This course is consistent with the principles and rules of equity.*"

As sustaining this admission appellants cite Equity Rules 29 and 81; *Eagle Iron Co.* v. *Colyar,* 156 Fed., 954.

For all practical purposes in answering the questions of law propounded by the court, it is immaterial whether

this action be treated as brought by the Arctic Iron Co. or by Kaufman and Breitung for themselves, and all other stockholders of the company. The question propounded by the court is whether or not action is barred by reason of the fact found by the court that Kaufman and Breitung insisted upon benefit to their outside interest as a condition to their consent to the Oliver lease.

VI.

Arctic is not confined to rescission but has the right to affirm the Oliver contract and hold Cliffs and Mather as trustees for its benefit.

The issue of whether the remedy of Arctic is confined to rescission or whether it may affirm the lease and ask for an accounting for the profits thereof, is clearly stated in appellants' brief (page 14), where they say:

> "We rest our answer to question 1-b upon the broad ground that, assuming the Cliffs' position to be fiduciary in character (or to involve results of that relation) the *only* remedy open to the Arctic after full discovery of the terms of the contract between the Cliffs and the Oliver was rescission of the lease."

By the betrayal of the trust that the law imposes on directors, Cliffs, through Mather and Hayden, secured the execution of a contract from which it inequitably profited to the extent of about $900,000.

The fact that it was interested in this contract was adroitly concealed from the other directors of Arctic for

about five years. During the time that Kaufman and Breitung were purposely deceived and kept in ignorance of the fraud effected by Cliffs through its automatons, Mather and Hayden, conditions materially changed.

Before the Oliver contract was made, the Corrigan leases were in force, and conditions subsequently arising make it certain that it was a mistake to have permitted the cancellation of the Corrigan leases. The Oliver lease could not have been made without cancellation of the Corrigan leases.

To carry out the scheme of Cliffs to secure this inequitable profit for itself and to keep the directors of Arctic in ignorance of the fact that it had any interest in the Oliver lease, the Regent Mining Co. was organized and the Oliver lease transferred and assigned to this corporation.

During these five years, before the discovery of the fraud, and after the discovery at the time of the death of Hayden, Cliffs' automatons constituted one-half of the board of directors of Arctic, and since the death of Hayden, Mather continued to act as a director. It is a fair presumption from the facts found, that Mather and Hayden were faithful to Cliffs in maintaining this secrecy. That they adroitly diverted from the attention of their fellow-directors, Kaufman and Breitung, anything that might lead to a discovery of the fraud.

During these years, it is fair to assume, the ore was taken out of the ground and some of the lands worked to the point of exhaustion. The Corrigan leases could not be reinstated. It was, at the time of discovery of the fraud, impossible to put the parties back in the positions they occupied before the Oliver lease was made.

Rescission of the contract was therefore inadequate to meet the conditions. It was impossible to restore the parties approximately to the positions they occupied before the lease was made.

The fact that it was impossible to restore the *status quo*, is due to fraud (concealment on the part of appellants and its agents being no small factor in effectuating the fraud), and appellants and its agents are solely responsible for the conditions brought about that prevented rescission from being either feasible or equitable.

VII.

Answer that appellee respectfully submits should be made to the questions of law propounded by the Circuit Court of Appeals.

With due deference to the Court, appellee respectfully suggests to the Court that under the record in this case the questions of law propounded herein by the Circuit Court of Appeals should be answered substantially as follows:

1-a. That "the Cliffs, stockholder in the Arctic, and also Mather's independent principal" is "so far affected by any fiduciary duties which may have rested on its agent, Mather, as a director in the Arctic, that the Arctic may recover from the Cliffs the latter's profits under the lease, even if no trust rested directly upon it, and if the director, Mather, received no personal benefit."

1-b. Plaintiff's remedy against Cliffs is not confined to rescission, but it may treat Cliffs as a trustee and re-

quire an accounting for the profits secured and have judgment for same.

2-a. "The conduct of Kaufman and Breitung, in insisting upon the benefit to their outside interest as a condition of their consent to the lease" does not "bar them, in their own names or in the name of the Arctic, from complaining in a Court of Equity of the conduct of the Cliffs, in insisting upon benefit to its outside interest as a condition of its consent to the lease."

2-b. "Their conduct pertains to a matter so distinct from that conduct of Cliffs, of which they complain, that the rule of clean hands does not apply."

3-a. "When Kaufman and Breitung were informed that the Cliffs had reached with the Oliver such an agreement that the Cliffs was willing to withdraw further objection to the Oliver lease" they were not "then and there bound to inquire as to the terms of such agreement, and when they did not, but proceeded without inquiring" they did not "thereby so far acquiesce in whatever terms were included in the agreement that a Court of Equity will not entertain their later complaint."

3-b. Kaufman and Breitung were "justified in assuming that the agreement did not pertain to the lease itself but to some outside matters of conflicting interest between Cliffs and Oliver."

4-a. "Under the existing make-up of the Arctic * * * Mather, as one of the Cliffs' directors of the Arctic," owed to "the Arctic and to the Breitung directors thereof to disclose that he had an outside interest in a contract which was about to be made by the Arctic," even though

in fact the contract was "well advised and for the best interests of the Arctic."

4-b. Mather's "directorship duty, under the existing relations of the two bodies of stockholders to each other and to the Arctic, and after he had offered to procure for it an even better contract," was not satisfied even though "he did nothing to promote the proposed contract, and left the decision whether it should be made and the terms thereof wholly to the Breitung directors."

5-a. "When it appeared that the Cliffs had interests and desires pertaining to the new lease which might conflict with the course Kaufman and Breitung desired the Arctic to take," the Cliffs and Mather did not "perform every duty which by law rested upon" Mather "as director of the Arctic, and through him upon the Cliffs even if Mather withdrew from any further participation of the matter and notified Kaufman and Breitung that they could go ahead and make for the Arctic a contract satisfactory to them, and that the Cliffs and Mather would acquiesce therein."

5-b. It was "the duty of Mather, as director in the Arctic, either to disclose to Kaufman and Breitung what he had done and the knowledge he had acquired as an officer of the Cliffs and on behalf of the Cliffs" in so far as that knowledge affected the rights and interests of Arctic, "or else to resign as a director of the Arctic."

6-a. "It was the legal duty of Mather to disclose to the Breitung directors the fact that the Cliffs was to be interested in the lease," even if "Kaufman and Breitung leased their beneficial three-fourths in the ore upon their own terms, and Cliffs retained its one-fourth interest in

the ore," as represented by its stock in Arctic, and that these facts are not "sufficient to bar a Court of Equity from enforcing any trust which might otherwise arise in favor of the Arctic in and to such one-fourth interest."

6-b. "Such trust, as a matter of law," became "so fixed that a Court of Equity will proceed according to the rights of Arctic without regard, in this particular, to the relative beneficial interests of the stockholders."

Respectfully submitted,

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CLEVELAND-CLIFFS IRON COMPANY ET AL. *v.* ARCTIC IRON COMPANY.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 75. Argued November 22, 1918.—Decided December 23, 1918.

A certificate from the Circuit Court of Appeals consisting of recitals of facts interblended with questions of law, or of recitals which fail in themselves to distinguish between ultimate and merely evidential facts, affords no basis under the statute (Jud. Code, § 239) either for answering the questions propounded or for exercising the discretionary power to call up the whole record, and must be dismissed. Certificate dismissed.

THE case is stated in the opinion.

Mr. A. C. Dustin and *Mr. Horace Andrews*, with whom *Mr. W. P. Belden* was on the briefs, for Cleveland-Cliffs Iron Co. *et al.*

Mr. S. W. Shaull and *Mr. C. C. Daniels*, with whom *Mr. A. C. Angell* was on the briefs, for Arctic Iron Co.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

The certificate upon which this case is before us contains what are denominated findings of fact grouped under eighteen paragraphs covering eight pages of the record. Upon these findings we are asked to instruct as to six propositions of law, really amounting to twelve since each is two-fold, that is, stated in the alternative. But we are of opinion that we may not instruct as to these propositions for the following reasons.

In the first place, because we think it is clear that the statements which are declared in the certificate to be findings of fact are in no true sense entitled to that characterization, since the statements amount but to a narrative of facts mixed with questions of law so interblended, the one with the other, as to cause it to be impossible to conclude as to either the law or the facts without a separation of the two, a duty which we may not be called upon to perform in giving instructions upon questions of law propounded under the statute controlling that subject.

In the second place, because even if the admixture of law and fact which inheres in the recitals in the certificate be overlooked, the recitals nevertheless, in and of themselves, fail to distinguish between facts which are merely evidential and those which are ultimate and which for that reason would be susceptible of furnishing support

for the legal propositions as to which instructions are asked.

It is true, indeed, that the statute gives us the discretion, when a case is certified, to direct the sending up of the whole record, but obviously the exercise of that discretionary power is not called for by a case where the certificate is of such a character as not to be embraced by the statute.

It must be, therefore, that this case affords no ground for directing the sending up of the whole record since here the certificate is inadequate to sustain the right to answer the questions stated. To hold to the contrary would be to cause a mistaken exercise of the right to certify specific questions to become the instrument by which the division of powers made by the statute would be disregarded.

The views which we have stated are in accord with the settled rules concerning the power to certify which have prevailed from the beginning. See *Dillon* v. *Strathearn S. S. Co.*, *post*, p. 182, and the authorities therein cited. It follows that the certificate must be and is

Dismissed.

MR. JUSTICE CLARKE, dissenting.

I greatly regret that I cannot concur in the conclusion of the court just announced.

That the certificate of the Circuit Court of Appeals is longer and more detailed than is usual is sufficiently explained by the unusual character of the facts in the case and of the questions of law involved. The certificate concludes with this statement:

"However, we consider that No. 5 presents a question of law which is, in the view most favorable to plaintiff, the ultimate one; and we desire that this question be answered, without prejudice from the inclusion of others in this certificate, if it shall be thought that the inclusion of the

others is not in accordance with the practice of the supreme court in this respect."

Question No. 5 is in the alternative, viz:

"5a. When it appeared that the Cliffs had interests and desires pertaining to the new lease which might conflict with the course Kaufman and Breitung desired the Arctic to take, did the Cliffs and Mather perform every duty which by law rested upon him as director of the Arctic and through him upon the Cliffs when Mather withdrew from any further participation in the matter and notified Kaufman and Breitung that they could go ahead and make for the Arctic a contract satisfactory to them, and that the Cliffs and Mather would acquiesce therein? or,

"5b. Was it the duty of Mather as director in the Arctic, either to disclose to Kaufman and Breitung what he had done and the knowledge he had acquired as an officer of the Cliffs and on behalf of the Cliffs, or else to resign as a director in the Arctic?"

While these two questions run into each other and could, perhaps, have been written as one, nevertheless, in my judgment, each presents a question of law, arising upon recited facts, and each is stated with sufficient precision to bring it within the terms of § 239 of the Judicial Code and Rule 37 of this court, and I therefore think that these two questions, at least, should have been answered, or that this court should have required that the whole record of the case be sent up for its consideration.